Supreme Court, U.S.
FILED

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No._____

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

v.

JOHN RODNEY MCRAE

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Sixth Amendment prohibits the police from interrogating a defendant after the adversarial process has begun, but does not prevent the defendant from asking to speak with the police or from speaking with old friends. Here, an incarcerated defendant asked to speak with an old friend who also happened to be a part-time, volunteer, reserve deputy sheriff.

The questions presented are:

1. Where the defendant made admissions about the crime to his friend, a part-time volunteer, reserve deputy sheriff, during their conversation, does the Sixth Amendment prevent the admission of this testimony?

2. What are the standards by which a court determines whether the conversation that they shared was, for Sixth Amendment purposes, the action of a state agent?

PARTIES TO THE PROCEEDING

In the courts below, the State of Michigan was the prosecution authority represented by both the Prosecutor of Clare County and by the Attorney General of Michigan. The State of Michigan is the Petitioner before this Court after the ruling of the Michigan Supreme Court that reversed the conviction and remanded the case for retrial.

The Respondent is John Rodney McRae. Mr. McRae was the defendant in the prosecution. He was convicted of first degree murder after a jury trial and was the prevailing party in the Michigan Supreme Court.

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OPINIONS BELOW

In a pretrial order that is relevant for this appeal, on August 27, 1998, the trial court denied respondent's motion to exclude the testimony of Dean Heintzelman regarding the post-indictment admissions that respondent made to him while respondent was in jail.

On December 11, 1998, respondent was convicted of first-degree premeditated murder. The trial court sentenced him to life in prison without parole on January 4, 1999.

On January 12, 2001, the Michigan Court of Appeals affirmed the conviction in an unpublished, per curiam opinion. *People v. John Rodney McRae*, (No. 217052). This opinion of the Court of Appeals held that any error regarding the testimony of Heintzelman was harmless beyond a reasonable doubt. In a peremptory order, the Michigan Supreme Court reversed the Court of Appeals as to its finding of harmless error and remanded to the Court of Appeals for consideration of respondent's claim that the admission of testimony violated his Sixth Amendment right to counsel. *People v. McRae*, 465 Mich. 874; 634 N.W.2d 361 (2001).

On remand, on February 12, 2002, the Michigan Court of Appeals again affirmed respondent's conviction in an unpublished, per curiam opinion. *People v. John Rodney McRae*, (No. 217052). On April 22, 2004, in a 5-to-2 opinion, the Michigan Supreme Court reversed the Court of Appeals decision, vacating respondent's conviction, and remanding for new trial based on its determination that respondent's defendant's Sixth Amendment right to counsel was violated. *People v. McRae*, 469 Mich. 704; 678 N.W.2d 425 (2004).

JURISDICTION

The Michigan Supreme Court issued its final decision on April 22, 2004, reversing the murder conviction of the Respondent and remanding the case for a new trial. This final decision of the State's highest court was based exclusively *upon the United States Constitution, Sixth Amendment.* Jurisdiction of this Court to issue Certiorari to the Michigan Supreme Court is invoked under the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interpretation of the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel of his defence.

STATEMENT OF THE CASE

This case arises out of Respondent John McRae's 1998 conviction of murdering and mutilating a young neighbor boy. This is his second such conviction. In 1950, in Macomb County, Michigan, when he was fifteen, Respondent slashed a nine-year-old boy to pieces with a straight razor. App. 133a-134a. He was convicted as an adult and spent the next 22 years serving out a life sentence. The Governor of the State of Michigan commuted his sentence to "time served" and Respondent was released in 1972.

Respondent left Michigan for several years and he returned in the early 1980s. He eventually settled just outside the tiny rural town of Harrison in central Michigan where he lived until 1987. No one in the Harrison area, including law enforcement, knew of John McRae's past. He had married and had a son who attended the local middle school. Another child who attended that school was Randy Laufer, who was 15-years old. Laufer was known to be friends with Respondent and his son, Martin. He regularly visited at Respondent's family home in the woods south of town. One of Respondent's few neighbors in that sparsely populated area was Dean Heintzelman, who lived with his wife and son "down the road." App. 123a-126a.

On September 15, 1987, Randy Laufer disappeared after leaving school. He was never again seen alive by his family. He was reported to and treated by the Sheriff as a runaway. App. 88a. In late November or December of 1987, Respondent packed up his family in the middle of the night and left Michigan. He left so quickly that his nearest neighbor only knew he had left when she woke up the next morning and found Respondent's family dog chained to her tree with a note pinned to his collar. App. 93a-94a. After Respondent left the community, the Sheriff learned about McRae's prior conviction and began to investigate the case as something more than a runaway child. App. 88a-90a.

The case went cold with no new evidence until August 20, 1997. The McRae homestead had been purchased by a neighbor and the buildings were razed and turned into a horse pasture. App. 95a-96a. A farm hand was instructed to take a backhoe and dig a pit to bury the concrete remnants of a small barn that had been on the property. When he lifted a scoop of dirt, the farm hand found Randy Laufer's skeleton. App. 102a. Forensic analysis showed that the boy had been tortured in a sexually sadistic manner (App. 170a-171a) --the body had been cut into at least two parts (App. 138a-140a) -- and then buried in a five foot deep hole dug under the gravel driveway that had been between the small barn and the door of Respondent's house trailer. App. 145a-146a.

In September 1997, Respondent was charged with first-degree premeditated murder, and he was extradited back to Michigan from Mesa, Arizona. App. 110a. Respondent was provided with a court-appointed attorney who represented him throughout the trial process. No member of the investigation or prosecution team attempted to speak with Respondent after he was arraigned. Respondent was held in the maximum security wing of the Clare County jail in Michigan, in a two-cell block. He was allowed visitation by his wife, Barbara, while he awaited the next stage of the criminal process, the preliminary examination. That occurred in January 1998.

During one or more of the visits by his wife, Respondent asked her to pass the word that he would enjoy a visit from his old neighbors. His wife understood that to be a reference to Dean Heintzelman, since the two men were friends when Respondent and his family had lived in the area. Dean Heintzelman's mother worked as a volunteer at the Sheriff's Department and Barbara McRae told her that her husband (Respondent) would like a visit from Heintzelman. The message was then passed to Dean Heintzelman. App. 54a, 62a-63a.

Although Heintzelman earned his living as a heavy equipment operator (App. 203a), he, like his mother, served as an unpaid, part-time volunteer reserve officer at the County Sheriff's Department. App. 203a. At a subsequent hearing in the trial court, he described his duties: "I go on transport, transport prisoners. We take care of ball games, do security at ball games. We help with visitation at the jail. That sort of stuff." App. 204. In addition, when the skeleton of Randy Laufer was discovered, Heintzelman was one of several people assigned to guard the perimeter of the gravesite overnight, until the Michigan State Police forensic evidence team could arrive the next day. App. 112a. Heintzelman had no investigative responsibilities in this case and there is no evidence that he ever had any investigative responsibilities under any circumstances.

On December 7, 1997, Heintzelman finished a prisoner transport assignment and was back at the jail in the late evening, after 11:00 PM. He decided to take that opportunity to visit with his old friend, Respondent McRae. App. 208a. Heintzelman went back to the cellblock and obtained permission from the turnkey to see McRae. The lights were still on in the cell area and Heintzelman was still wearing the uniform of a reserve deputy. App. 208a-209a. As he approached the cell, Respondent rose to meet him. The two old friends shook hands through the cell bars and Respondent showed Heintzelman pictures of his family. App. 194a. They chatted casually until Heintzelman asked Respondent if he

really did what he was charged with. Respondent did not answer. App. 208a. Heintzelman mentioned that the prosecution had charged his son, Martin, as an accessory to the crime.[1] In response, McRae said, "Well, if they try to pin it on Marty, I'll let 'em fry my ass." Heintzelman then again asked, "John, did you do it?" Respondent hung his head down and said, "Dean, it was bad. It was bad." Heintzelman became so angry that he left the cellblock without further conversation. App. 208a-209a.

Regarding the conversation, Heintzelman explained he spoke with Respondent as an old neighbor and friend of Respondent and was not there in his capacity as a reserve deputy. Specifically, he testified, App. 59a-60a:

> Q. Before you asked him those questions, did you give him what is commonly called the *Miranda* warnings?
>
> A. There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.
>
> Q. You didn't feel at that point in time it was necessary that you explain to him that he had a right to remain silent or that he needed – that he had a right to have an attorney there if you were going to question him?
>
> A. No, we was [sic] talking like friends, just like I'd be talking to you.

---

[1] Martin McRae had been arrested simultaneously with respondent in Arizona. He had been charged as an accessory-after-the-fact on the theory that he dug the burial pit that held the victim. The case against Martin McRae was later dismissed at the examination stage on a jurisdictional issue because he had been a minor at the time of his alleged involvement. However, at the time of the meeting between respondent and Dean Heintzelman, the case against Martin McRae was still pending. Respondent knew of pending proceedings involving his son.

Q. So that was your view that you were asking-

A. Yeah.

Q. Questions about this case as a friend?

A. Yeah. Yeah, as a neighbor and everything, you know.

Sometime later Heintzelman informed the Sheriff's detective lieutenant of the conversation. The prosecution then gave Respondent immediate informal notice and, on June 3, 1998, gave formal notice of the intent to introduce the evidence of Respondent's statements to Heintzelman at trial.

On August 27, 1998, the trial court held a hearing to determine the admissibility of the contested evidence including Respondent's statements to Heintzelman. The court had before it the testimony of Dean Heintzelman, Respondent McRae, Respondent's wife, Barbara McRae, and a jail cellmate of Respondent named Kerry Kocis. At the conclusion of the hearing the judge held as follows, App.81a:

> Well, the issue for the Court, as far as the Court is concerned, is why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at that point in time, or was he back there at the request of the defendant, and *it seems pretty evident to the fact that he was back there at the request of the defendant.* He wanted to talk to him. The defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do. [Emphasis added.]

The court then issued an order denying the motion in limine to suppress the statement. App. 81a, 48a.

On December 11, 1998, Respondent was convicted of first-degree premeditated murder. On January 4, 1999, the trial judge imposed a mandatory sentence of life in prison.

Respondent appealed by right and, on January 12, 2001, the Michigan Court of Appeals affirmed his conviction. App. 39a-47a. As to the issue of the Heintzelman evidence, the Michigan Court of Appeals did not reach the issue of the constitutionality of the encounter. Instead, the Court found that the error, if any, was harmless beyond a reasonable doubt in light of the other overwhelming evidence of guilt.

Respondent appealed to the Michigan Supreme Court. In an order dated September 19, 2001, the Michigan Supreme Court found that any error regarding the admission of Respondent's statements to Heintzelman would not be harmless and remanded it to the Court of Appeals for a determination whether there was error. App. 37a. On February 12, 2002, the Court of Appeals again issued an opinion (after remand) and affirmed the conviction after reconsideration as directed by the Supreme Court. App. 27a-36a.

On June 19, 2003, Respondent was next granted a delayed leave to appeal to the Michigan Supreme Court on the sole issue of the admissibility of the Heintzelman statements. On April 22, 2004, the Michigan Supreme Court issued a 5-to-2 opinion reversing Respondent's conviction and remanding the case for retrial. App. 1a-27a. The Michigan Supreme Court based its reversal of conviction on its conclusion that Respondent's Sixth Amendment rights had been violated by admitting the evidence of the conversation between him and Dean Heintzelman.

REASONS FOR GRANTING THE WRIT

Introduction

This Court has never established criteria for determining when a person acts as an agent of the government for Sixth Amendment purposes although State and lower federal courts have, on occasion, described various factors to be considered. The Michigan Supreme Court's decision neither announces nor follows any apparent guidelines for making such a determination. Such an ad hoc determination provides no guidelines for either law enforcement or for trial courts and contradicts the basic framework employed by other State and federal courts. This Court should grant certiorari and provide workable criteria for guidance in Sixth Amendment cases. Also, this Court should address the issue of "harmless error" in the context of the Sixth Amendment under these circumstances.

I. The Sixth Amendment prohibits the police from interrogating an accused after the adversarial process has begun, but does not prevent the accused from asking to speak with the police or from speaking with old friends. Here Respondent asked to speak with an old friend who also happened to be a part-time, police officer and, during their conversation, Respondent made admissions about the crime. The Sixth Amendment does not prevent the admission of this testimony.

A. This Sixth Amendment protects an accused from interrogation by the government after his right to an attorney attaches.

The Sixth Amendment protects an accused from efforts by the government to obtain incriminating statements from him, after indictment, in the absence of his attorney, even at pretrial stages of the judicial process. When the right to counsel has attached, statements obtained without waiver of that right are

inadmissible, regardless of any issue of coercion as the rule applies with equal force where the accused is not aware that he is being interrogated. *Massiah v. United States,* 377 U.S. 201, 202 ; 84 S. Ct. 1199; 12 L. Ed. 2d 246 (1964).

After commencement of the government's case, the Sixth Amendment guarantee of counsel, applies anytime the government uses an agent to acquire incriminating statements from the defendant. See, e.g., *United States v. Henry,* 447 U.S. 264; 100 S. Ct. 2183; 65 L. Ed. 2d 115 (1980). In *Henry*, this Court examined a case where investigators used the services of a frequent jailhouse informant who was paid when he obtained evidence. A threshold consideration of this Court was that the informant "was acting under instructions as a paid informant for the Government[.]" *Id.,* 447 U.S. at 269. Even though the FBI agent submitted an affidavit that he instructed the informant not to initiate conversations on the subject of the charges against Henry, the circumstances of the incarceration and the informant's prior aggressive investigation techniques made it clear that such instructions would not restrain the informant from interrogating Henry on behalf of the government. This was especially true due to the contingent fee basis of payment for the agent-informant. *Henry, supra,* 447 U.S. at 270-271. See also *Maine v. Moulton*, 474 U.S. 159; 106 S. Ct. 477; 88 L. Ed. 2d 481 (1985) (after the accused had been indicted, the government's use of codefendant as a secret government agent violated the accused's Sixth Amendment right to counsel).

In *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981), this Court established the bright-line rule that an accused who expresses a desire to deal with the police only through counsel in pre-arraignment interrogations may not be subject to further interrogation by the authorities until counsel has been made available unless the accused initiates further communication:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot

> be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [footnotes omitted.]

The *Edwards* bright-line rule was developed in the context of Fifth Amendment protections against coerced confessions occurring during pre-arraignment custodial interrogations after an accused requested counsel. The Court previously explained that any exchange between the police and a suspect after he has invoked his right to an attorney that is designed to elicit damaging admissions is interrogation. See *Brewer v. Williams*, 430 U.S. 387, 403; 97 S. Ct. 1232; 51 L. Ed. 2d 424 (1977) (the "Christian burial speech" between the officers that triggered the suspect's confession violated the suspect's Sixth Amendment right to counsel because it was improper interrogation).

The *Edwards* rule was later extended to cover post-arraignment interrogations in a Sixth Amendment context in *Michigan v. Jackson*, 475 U.S. 625, 632; 106 S. Ct. 1404; 89 L. Ed. 2d 631 (1986):

> [T]he Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.
>
> Indeed, after a formal accusation has been made – and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment – the

> constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see [*Henry*, *supra*] or the electronic surveillance of conversations with third parties, see [*Maine v. Moulton*, *supra*] and; [*Massiah*, *supra*], may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment. Far from undermining the *Edwards* rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

The Sixth Amendment protection is guaranteed in order to assure that an unsophisticated accused has professional representation when the criminal law system is actively arrayed against him. See *United States v Gouveia,* 467 U.S. 180, 189 (1984) ("[the Sixth Amendment's] purpose [is to] protect[] the unaided layman at critical confrontations with his adversary"). This Court's cases make it clear that the "adversary" of an indicted criminal defendant is the government itself or an agent working at the direction of the government.

Respondent here was formally charged and had been provided with counsel at the time that he spoke with his old friend, Dean Heintzelman. Consequently, this case must be examined as a Sixth Amendment matter, which has different precedents and testing criteria than a Fifth Amendment case. See *Illinois v. Perkins*, 496 U.S. 292, 299; 110 S. Ct. 2394; 110 L. Ed. 2d 243 (1990) (the police did not violate the suspect's rights under the Fifth Amendment where the suspect made

admissions to an undercover agent before the adversarial process had begun).

The issue here is whether Heintzelman was a private party acting on his own or whether he was a government agent acting on behalf of the prosecution team.

B. This Court has not established a bright-line test for determining when a person acts as a government agent for Sixth Amendment purposes.

This Court has not defined when the person in communication with a criminal defendant is actually acting as a government agent for purposes of evaluating a possible violation of the Sixth Amendment. See *United States v. Taylor*, 800 F.2d 1012, 1015 (CA 10, 1986) ("We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel."); *Thomas v. Cox*, 708 F.2d 132, 136 (CA 4, 1983), *cert. denied*, 464 U.S. 918; 104 S. Ct. 284; 78 L. Ed. 2d 262 (1983) ("The point at which agency – hence proper attribution – for this purpose arises out of a government-citizen relationship is not subject to any bright-line test.").

The United States Court of Appeals for the Fourth Circuit identified this Court's three central cases, *Massiah v. United States, Brewer v. Williams,* and *United States v. Henry,* and noted that none had defined the nature of the person's relationship to the government to make him an "agent," *Thomas v Cox, supra,* 708 F.2d at 135:

> In none of the three principal decisions of the Supreme Court that define the reach of Sixth Amendment protections against government's "deliberate elicitation" of incriminating evidence from accused persons unaccompanied by counsel – *Massiah v. United States*; *Brewer v. Williams*; and *United States v. Henry* – has the "agency" of the person directly eliciting the

> evidence been the focal point of inquiry. But in each the necessity of such a relationship has been assumed. [citations omitted.]

Where the issue is whether the Sixth Amendment protections of an accused have been violated, irrespective of the formula used to determine whether there was an interrogation, the threshold question was whether the questioner was acting, at the critical time, as an agent of the government. The Fourth Circuit recognized this point, *Thomas v. Cox, supra*, 708 F.2d at 135:

> [W]here the citizen himself actively, though surreptitiously, elicits disclosures, the only question is whether at the critical time he was also a creature – an agent – of the state. If so, his deliberate elicitation of evidence is necessarily attributable to the state as would be that of a state official. [footnote omitted.]

See also, *United States v Taylor, supra,* 800 F.2d at 1015.

C. The test to determine whether a person who speaks with an accused after arraignment is a government agent must focus primarily on the purpose of the interaction.

As the Fourth Circuit in *Thomas v. Cox* recognized, the major cases that discuss whether a violation of the Sixth Amendment right to counsel might have occurred assume the agency status of the person who questioned the accused. Where the real issue is, in fact, the existence of that agency status itself, few courts have attempted to delineate criteria to guide this threshold inquiry. This lack of guidance is especially apparent where the questioner is not a jail cellmate or an accomplice informant.

Nevertheless, consistent with the purpose of the Sixth Amendment of "protecting the unaided layman against . . . his

adversary," see *Gouveia, supra,* the federal appellate courts have recognized that the examination whether a person who has met with an indicted criminal defendant has acted as a government agent focuses on the purpose of the meeting – whether the meeting was designed to improve the quality or quantity of evidence the government had against the accused. See, e.g., *United States v. Birbal*, 113 F.3d 342, 346 (CA 2, 1997), where the Second Circuit cited five different circuit courts of appeal in support of its analysis and determined that agency turned on whether the informant was instructed to "get information" from the accused:

> An informant becomes a government agent for purposes of [the Sixth Amendment] only when the informant has been instructed by the police *to get information* about the particular defendant. [emphasis added.]

In fact, apart from the jailhouse informant situation, two courts have specifically evaluated the status of a person interacting with the accused after the Sixth Amendment right had attached. Those courts tried to develop criteria by which to determine whether the person acted for the government as its agent.

First, in *United States v. Gaddy*, 894 F.2d 1307, 1309-1311 (CA 11, 1990), the Eleventh Circuit examined a habeas corpus case where a murder suspect, after asserting his Fifth and Sixth Amendment rights, was called by his aunt, a police officer, and she encouraged him to confess to the detectives. The Court held that there was no Sixth Amendment violation because at the time, despite her official status, the aunt was not acting in furtherance of the investigation.

In reaching this conclusion, the Court focused on the fact that the aunt was not part of the investigative team, was not directed by a superior to contact the suspect, had acted solely out of concern for the defendant's welfare, and that there was no evidence that the aunt had been acting in the normal course

of her duties when she initiated contact with her nephew, 894 F.2d at 1311:

> [B]y encouraging Danner [the defendant] to tell the police what he knew, [Janice Hernandez, a county police officer and the aunt of the defendant] acted as a worried aunt who envisioned the hardship that could befall her nephew if he did not reveal the information he possessed, especially before Gaddy [codefendant] rendered his version of the events to the police.
>
> The evidence shows that at the time Hernandez contacted Danner she was employed by the Chatham County Police Department, but that even though she was a police officer, her duties were not investigative in nature. She contacted Danner of her own accord, not at the direction of a superior and not for the benefit of the police department. She made no written report following that communication, as would have been customary had Hernandez been acting in an official capacity. Thus, no police-initiated interrogation occurred. [Paragraph break added.]

Further, the Court found that the aunt "could have taken the same action had she been reached at her home, as a private citizen who might provide a lead to the detectives." *United States v Gaddy, supra,* 894 F.2d at 1311.

Second, in *Cook v. State of Georgia,* 270 Georgia 820; 514 S.E.2d 657 (1999), the Georgia Supreme Court had before it a case of a young man charged with a double murder. He was charged and had exercised his Fifth and Sixth Amendment rights. He asked to speak with his father at the same time that he demanded an attorney. The defendant's father, an FBI agent, spoke with his son at the jail. At trial, the prosecution

introduced the defendant's admissions to his father. The defendant was convicted and his appeal was based upon an argument that he was interrogated by his father in violation of his Sixth Amendment right to counsel.

The Georgia Court affirmed the conviction and the admission of the evidence obtained by the father. In reaching this decision, the Court reviewed numerous factors to determine whether the FBI agent-father was acting as a state agent or was acting in his private capacity as the father of the suspect. The Georgia Court listed the factors that the Eleventh Circuit had weighed in *Gaddy* and listed the corresponding facts as it related to the case, 270 Georgia at 827:

> (1) John Cook [the defendant's father] was not part of the investigative team on the Lake Juliette murders (in fact, the FBI did not have jurisdiction to investigate the case);
>
> (2) Cook asked to see his father at the same time he requested an attorney;
>
> (3) John Cook was not directed by any law enforcement agent connected with Cook's case to speak to his son – he made the request on his own initiative;
>
> (4) John Cook's motive in speaking with his son was to urge him to cooperate in the hope of getting a plea bargain; and
>
> (5) the interview involved hugging and crying by father and son which is not typical of a police interrogation. [Formatting added.]

Therefore, in summary, like the Eleventh Circuit, the Georgia Court considered the following factors:

(1) whether the person was a part of the investigative team in the case in question;

(2) whether the person was directed by a superior to speak with the suspect;

(3) whether the person acted solely out of concern for the welfare of the suspect;

(4) whether the person acted in the normal course of his duties when talking with the suspect; and

(5) whether the interview involved typical police interrogation tactics and techniques.

These factors focus on *the purpose of the visit*, examining whether the friend or family member was acting at the behest of, and under the direction of, the government and was attempting to improve the quality of the government's case against the suspect, which is consistent with the Second Circuit's analysis in the informant context. See *Birbal, supra,* 113 F.3d 342.

The *Gaddy* test eliminates the need for discussion of non-essential circumstances such as whether the person was actually employed by the government, was on or off duty, in uniform or out, or what time of day the meeting occurred. A civilian citizen could be made a government agent and violate the Sixth Amendment protections of a suspect if instructed and sent by the State to question the defendant. See *Moulton, supra.* Conversely, a police officer who is an old friend and neighbor of a defendant is not necessarily an agent of the government when he visits a defendant at the defendant's request.

D. Applying the proper standards, the person who interacted with defendant here, Dean Heintzelman, was not a government agent. There was no Sixth Amendment violation.

Applying the *Gaddy* factors, the record is clear that Dean Heintzelman was acting as Respondent's friend, not as a government agent.

First, Dean Heintzelman was never a member of the investigative team in this case. His sole prior contact with the case was to guard the perimeter of the crime scene overnight until the state police forensic evidence team arrived the next morning.

Second, there is no evidence that any superior of Dean Heintzelman or member of the prosecution directed Heintzelman to speak with the suspect. On the contrary, the record in this case is clear and undisputed that Respondent, acting through his wife, specifically invited Heintzelman to come visit with him at the jail. Heintzelman did not advise any police superior or prosecution official before he went to see Respondent.

Third, Heintzelman was speaking with Respondent as an old friend, out of concern for his friend. The only evidence as to the motive for Dean Heintzelman to speak with Respondent came in response to cross-examination when Heintzelman was asked whether he had read *Miranda* rights to Respondent McRae, App. 59a-60a:

> There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.

* * *

> No, we was [sic] talking like friends, just like I'd be talking to you.
>
> * * *
>
> Yeah, as a neighbor and everything, you know. App. 59a-60a.

Fourth, the normal course of Dean Heintzelman's duties as a volunteer reserve deputy was typically crowd control for parades on the Fourth of July and similar holidays or at county baseball games. Occasionally, he was called upon to transport prisoners from one county jail to another, as occurred on the night of his meeting with Respondent. App. 208a. Heintzelman did not have any investigative responsibilities with respect to this case or any other criminal investigation.

Fifth, and finally, this interview did not follow typical police interrogation tactics and techniques. Respondent was physically separated from Heintzelman by the bars of his cell. App. 56a. There was another inmate, Kerry Kocis, observing the conversation from a few feet away. App. 64a-65a. Moreover, contrary to the ordinary circumstances of a police interrogation, Respondent showed Heintzelman pictures of his family to catch up with past events. App. 208a. Furthermore, when Respondent made his incriminating response, Dean Heintzelman reacted as a betrayed friend rather than as a detective. He stormed out of the cellblock. App. 209a. Typical police interrogation tactics would have demanded that the officer immediately pursue the opening in an effort to obtain a complete confession. If the goal of this meeting was to improve the government's case, Heintzelman would have capitalized upon the obvious opening Respondent had given him.

It was only after the fact, that Dean Heintzelman reported the incident to the detective-lieutenant in charge of the investigation. Only then did he offer to return and continue interrogating Respondent. He was instructed by those who

were charged with investigating and presenting the case not to have further contact with Respondent. App. 10a, 60a-61a. Dean Heintzelman was a private person – an old friend and neighbor – acting solely in that capacity at the time of his only encounter with Respondent.

E. The Michigan Supreme Court effectively rejected the other court decisions, establishing a conflict between it and federal and other State jurisdictions, by wrongly examining factors relevant for Fifth Amendment consideration and failing to examine the purpose for which Dean Heintzelman was speaking with Respondent, which was as a friend, not as a government agent.

The Michigan Supreme Court ruled that Dean Heintzelman was at the relevant time a state actor. Significantly, however, the Court recognized that "*[d]efendant merely initiated a social visit with his old friend and neighbor*" at the time he made the damaging admissions to Heintzelman. *Michigan v McRae,* 469 Mich. 704, 717; 678 N.W.2d 425 (2004). App.13a.

The Michigan Court did not concentrate on recognized criteria for determining Heintzelman's agency status but instead focused on facts only relevant in determining whether coercive forces were employed by the State at the time of the meeting. The Court considered that Heintzelman visited Respondent while in uniform, visited him late at night, and asked him twice whether he committed the crime. The Court apparently considered Heintzelman to be part of the "police team" because he assisted the sheriff in guarding the gravesite of the victim overnight until the State Police forensic evidence team could come to the scene the next morning.[2]

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[2] Nevertheless, the record was clear that Heintzelman never had any investigative responsibilities in this or any other investigation. When questioned under oath, Heintzelman described his duties as crowd control

While these criteria might have been applicable in examining whether there was coercion if this had been a Fifth Amendment issue, these factors considered by the Michigan court are irrelevant for Sixth Amendment purposes when determining whether Dean Heintzelman was acting as an agent of the government during his encounter with Respondent, or whether he was a private person who happened to be wearing the uniform of a sheriff deputy during the friendly visit requested by Respondent.

Moreover, the record is devoid of any evidence that Respondent felt coerced to say anything. Respondent testified at a pretrial suppression hearing on this issue and never said he felt compelled to answer any of Dean Heintzelman's questions. The described behavior of the two men demonstrated a relaxed conversation between old neighbors. The men shook hands through the bars of the jail cell. They spoke about their respective families. Respondent showed Heintzelman photos of his son and grandchildren.

The Michigan Supreme Court based a significant part of its analysis on *Griffin v. Maryland*, 378 US 130; 84 S. Ct. 1770; 12 L. Ed. 2d 754 (1964) to show that Heintzelman acted with apparent authority. *Griffin* involved a private park employee who had been deputized by the county sheriff. He used that deputization to arrest five African Americans for criminal trespass when they would not leave the park. This Court found that he had apparent authority as a sheriff deputy and "purported to exercise the authority of a deputy sheriff." *Griffin, supra,* 378 U.S. at 135.

The reliance by the Michigan court on this case was erroneous. The question in *Griffin* was whether a private person could, by grant, exercise a portion of the police power of the State. Here, the question is whether an unpaid part-time

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on holidays and occasionally transporting prisoners to and from the county jail. App. 204a.

volunteer for the government can engage in conversation without acting on behalf of the government. In *Griffin,* the park officer clearly held himself out as a government agent and initiated the action under review. The case could not have existed if he had not acted with the power of a law enforcement officer by arresting the victims. But, here, Heintzelman did not hold himself out as a government agent and was not acting under purported government authority. Rather, he was acting as a friend. Heintzelman did not initiate this encounter; it was started by Respondent's invitation. The Michigan Supreme Court's majority opinion, relying as it does so heavily upon the *Griffin* apparent authority language, sweeps so broadly that, as recognized by the dissent in *McRae*, 469 Mich at 727, App. 25a:

> [The majority] [c]oncluded that someone who happens to have volunteered as a part-time, reserve police officer cannot ask a friend about a crime with which he has been charged without running afoul of the Sixth Amendment.

The Michigan Court considered that Heintzelman was in a sheriff deputy uniform, that he mentioned that the Respondent's son also faced charges, and that he asked the critical question twice. These are Fifth Amendment questions. They do not address whether Heintzelman was sent in to get information from Respondent or whether he was acting on behalf of the government. Even though this Court was speaking in the context of interrogation by an undisclosed informant, it recognized the difference between Fifth Amendment and Sixth Amendment concerns, *Henry*, *supra*, at 447 U.S. at 273:

> That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel.

The Michigan Supreme Court recognized that determining whether Dean Heintzelman was a government actor at the time of his encounter with Respondent was the core issue in the appellate review. The court then reached a decision that ignored the primary purpose of his conversation with Respondent. In fact, the court's characterization of the conversation as a "social visit" contradicts its conclusion that Heintzelman was acting as a government agent. The essential fault of the decision below is that it ignored the focal question as stated by the Second Circuit: Was Heintzelman instructed by anyone involved in the prosecution to get information about Respondent? *Birbal, supra.* *Gaddy* and *Cook* provided a standard for answering that question, a standard that the Michigan Supreme Court effectively rejected.

The Michigan Supreme Court majority erred in finding that the Sixth Amendment rights of Respondent were violated. Dean Heintzelman was someone who visited an old friend, Respondent, at Respondent's request, because he wanted visitors. During their conversation, Respondent admitted to Heintzelman that the crime "was bad." The fact that Heintzelman was an off-duty, reserve deputy sheriff did not transform this social visit into government action. This was a conversation between friends. There was no violation of the Sixth Amendment. The Michigan Supreme Court was wrong to overturn Respondent's conviction for murder on this basis.

II. Any error that may have resulted from the introduction of evidence of Respondent's statement to Dean Heintzelman is harmless beyond a reasonable doubt in light of the additional, overwhelming, valid evidence of guilt.

A. Procedural Background.

The Michigan Court of Appeals, upon first review, refused to rule on the constitutionality of Respondent's admissions to Heintzelman under the Sixth Amendment. Rather, the Michigan Court of Appeals held that even if there were error it

was harmless due to the overwhelming weight of the other admissible evidence demonstrating Respondent's guilt. *People v. McRae,* Michigan Court of Appeals unpublished *per curiam* opinion, January 12, 2001 (No. 217052). App. 46a.

In an interlocutory appellate ruling, the Michigan Supreme Court remanded the issue to the Court of Appeals upon a finding that if the statement were error, this error would not be harmless beyond a reasonable doubt. *People v. McRae,* 465 Mich 874; 634 N.W.2d 361 (2003). The Michigan Supreme Court rendered this decision without any analysis of the other evidence in the record. The interlocutory order stated in its entirety, App. 37a:

> On order of the Court, the delayed application for leave to appeal from the January 12, 2001, decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE, in part, the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the defendant's claim of error with regard to the testimony of witness Heintzelman concerning defendant's alleged statement. In its opinion in this matter, the Court of Appeals, while declining to decide whether there was in fact error, went on to decide that if there had been error, it was harmless beyond a reasonable doubt. We disagree. *If the admission of that statement was error, the error was not harmless beyond a reasonable doubt.* Accordingly, on remand, the Court of Appeals shall directly decide whether the admission of this testimony was error and, if it decides that it was, shall reverse the defendant's conviction and remand for a new trial. In all other respects, leave to appeal is DENIED. [Emphasis added.]

B. The Michigan Supreme Court erred when it failed to recognize that the admission of Respondent's statements was harmless in light of the other overwhelming evidence of guilt.

This Court has jurisdiction to review a State court determination of whether an alleged Federal Constitutional error was harmless. In *Chapman v. California,* 386 U.S. 18, 21; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967), where the prosecutor repeatedly commented during trial upon the defendants' failure to testify, this Court rejected the proposition that all constitutional error must be harmful and thus reversible.

With regard to an alleged violation of an accused's Sixth Amendment right to counsel, this Court has specifically recognized that such an error may be harmless. *Milton v. Wainwright*, 407 U.S. 371, 33 L. Ed. 2d 1, 92 S. Ct. 2174 (1972). In *Milton*, the Court rejected a defendant's Sixth Amendment claim without reaching the issue because any error was harmless beyond a reasonable doubt, 407 U.S. at 372:

> [Defendant] [c]ontend[s] that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently interpreted in *Massiah v. United States*, 377 U.S. 201 (1964)[.]
>
> * * *
>
> [W]e have concluded that the judgment under review must be affirmed without reaching the merits of petitioner's present claim. Assuming, arguendo, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt.

Hence, any error here is subject to harmless error analysis.

In a review of when the harmless error standard is appropriate to judge allegations of constitutional violations, this Court stated, in *Sullivan v. Louisiana,* 508 U.S. 275, 278-279; 113 S. Ct. 2078; 124 L. Ed. 2d 182 (1993):

> The *Chapman* standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the fact finding process at trial."
>
> * * *
>
> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error...." [Citations omitted; emphasis in original.]

Here, the Michigan Supreme Court summarily concluded that the statement obtained by Dean Heintzelman could not have been harmless. The Court reached this result without any analysis of the additional evidence in the record or balancing the equivocal impact of Respondent's statement to Heintzelman with the other proofs.

The evidence at trial demonstrated that young Randy Laufer was a neighbor of Respondent and frequently visited the

McRae home. App. 125a-126a. The victim disappeared on September 14, 1987 (App. 119a-121a), while Respondent lived at that home site. Soon after the boy disappeared, McRae packed up his family in the middle of the night and moved across the country. The victim's body was found on August 20, 1997, buried in the gravel driveway that had separated Respondent's small barn and the rear door of his trailer home (approximately 15 feet from his rear door). Laufer's skeleton showed several knife cut marks on the inner surface of the sacrum that could only reasonably be interpreted as multiple rectal stabbings.

There was an additional confession by Respondent admitted into evidence that was not constitutionally challenged. The Michigan Supreme Court totally ignored this fact in its summary ruling. While Respondent shared a cellblock with an inmate named Travis Troost, in July of 1997, he admitted killing the victim (although he blamed it on an "altercation" rather than a sadistic, sexually motivated assault). App. 189a. He stated to Travis Troost that the police had it wrong when they assumed he killed the boy with a knife because in fact, he explained, he shot him twice with a bolt-action single-shot 22-caliber rifle. App. 189a, 191a.

The detective in charge of the investigation, Lt. Mark McClellan, had no intimation that a firearm was involved with the murder and there were no known press reports that mentioned a gun. App. 109a-110a. Nevertheless, Patrick Agin, another friend of Respondent's son, totally independent of Troost, corroborated the fact that Respondent maintained a 22 caliber, single shot, bolt action rifle in his home before Laufer disappeared. App. 152a-153a. Troost would not have had any other means of knowing about this specifically described weapon other than Respondent telling him. Respondent also admitted to Travis Troost that after burying the boy, he spread goat manure over the gravesite to prevent the cadaver dogs from picking up the scent of his victim. App. 189a, 191a.

In addition to the testimony from Travis Troost, the jury heard evidence that Respondent committed a strikingly similar murder earlier in his life in which the victim, Joey Housey, was also a young boy. Housey's body was also violated in a sexually oriented effort at dismemberment and apparent torture. Both a forensic psychologist and a forensic psychiatrist explained that Respondent's earlier crime and the crime at bar were driven by the same relatively rare motivation, sexual sadism. App. 157a-160a; 170a-172a; 179a-181a.

Consequently, Respondent's ambiguous incriminating statement to Dean Heintzelman had no substantial or injurious effect on jury deliberations when evaluated in the context of the otherwise overwhelming, valid evidence that proved his guilt beyond a reasonable doubt. If anything, Respondent's admission to Heintzelman was merely cumulative to the testimony of Troost. The admission of this evidence, even if a violation of Respondent's right to counsel, was harmless beyond a reasonable doubt.

The Michigan Supreme Court was wrong to reverse the conviction of a child murderer, in spite of the other overwhelming evidence of guilt, on the basis of technical ruling that could not have been foreseen or anticipated. Respondent's admission to Heintzelman was only a small piece of evidence in the array of proof showing guilt. Any possible error regarding Respondent's admission to Heintzelman had no bearing on the jury's verdict.

CONCLUSION

Petitioner, State of Michigan, asks this Court to grant certiorari and to reverse the judgment of the Michigan Supreme Court that Respondent's Sixth Amendment rights of counsel were violated when he initiated a conversation with an old friend who happened to be a part-time, off duty, reserve sheriff's deputy and in the course of that meeting made an incriminating admission.

Respectfully submitted,

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July 2004

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Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice
Maura D. Corrigan

Justices
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

FILED APRIL 22, 2004

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 121300

JOHN RODNEY MCRAE,

Defendant-Appellant

BEFORE THE ENTIRE BENCH

CORRIGAN, C.J.

In this case we must determine whether the admission of statements made by defendant to a sheriff's reserve deputy violated defendant's Sixth Amendment rights. We conclude that the admission of the statements did violate defendant's

Sixth Amendment rights because, under the circumstances in this case, the reserve deputy was a state actor at the time he questioned defendant, who had not waived his Sixth Amendment right to counsel. We have already concluded that such an error would not be harmless beyond a reasonable doubt;[1] therefore, we reverse the decision of the Court of Appeals and remand for a new trial.

I. FACTUAL HISTORY AND PROCEDURAL POSTURE

Defendant was charged with first-degree murder after the remains of fifteen-year-old Randy Laufer were found on the grounds of defendant's previous residence. After defendant was arrested, he received his *Miranda*[2] warnings and invoked both his Fifth Amendment right to be free from compelled self-incrimination and his Sixth Amendment right to counsel. After arraignment, while defendant was in custody awaiting trial, defendant apparently requested to speak to an old neighbor, Dean Heintzelman. It had been ten years since defendant had seen Heintzelman, and defendant was unaware that Heintzelman had become a reserve police officer. Further, defendant was unaware that both Heintzelman and Heintzelman's son were part of the police team present at the scene when Randy Laufer's body was recovered.

Heintzelman visited defendant after he finished his shift as a reserve deputy. Before visiting defendant, Heintzelman asked the permission of one of the corrections officers to do so. Heintzelman was in full uniform, complete with badge.

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[1] 465 Mich 874 (2001).

[2] *Miranda v Arizona* , 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)

Although it was some time after eleven o'clock at night, Heintzelman was allowed to go directly to defendant's maximum security cell. Heintzelman later testified that he had the following conversation with defendant:

> Well, first we just started talkin', talkin' about – shook hands and everything, you know, like I hadn't seen him in a long, long time. . . . I asked him about his boy, Marty, 'cuz his boy Marty is the same age as my son. . . . I told him, I said, "Well, Marty's in here from what I understand, too."[3] And then he showed me pictures of Marty's wife and his baby, and we carried on a conversation, like you or I would.
>
> And then I said – I asked John – I said, "John, did you do what you're charged with here?" And he didn't answer me. So we just went talkin' again about, well, more or less about Marty again. And I said, "Well, you know, they think Marty had something to do with that, you know, with Randy." And he says, "Well, if they try to pin it on Marty, I'll let 'em fry my ass." And that was his words.
>
> I said, "John, did you do it?" And he just hung his head down and said, "Dean, it was bad. It was bad." That's – we didn't discuss it any more.

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[3] Defendant's son had been held as an accessory to the murder.

After questioning defendant about the charges, Heintzelman reported the discussion to Lieutenant McClellan, who was the officer in charge of the Laufer investigation scene. Heintzelman then volunteered to go back and talk to defendant if McClellan requested. Heintzelman was not permitted to speak with defendant again.

Defendant moved to suppress Heintzelman's testimony regarding defendant's statements because the alleged statements were obtained in violation of defendant's right to counsel and because defendant was not given *Miranda* warnings again before questioning. After an evidentiary hearing, the trial court denied defendant's motion to suppress on the ground that defendant had initiated the conversation. After defendant was convicted by a jury of first-degree murder, he challenged on appeal the admission of the statements.[4] The Court of Appeals did not determine if there was error, ruling instead that, even if the admission were error, it was harmless beyond a reasonable doubt.[5]

Upon defendant's first application for leave to appeal, this Court determined that if the admission of the statement were error, such error would not be harmless beyond a reasonable doubt. This Court vacated the Court of Appeals judgment in part and remanded the case for reconsideration of defendant's claim of error.[6]

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[4] Defendant also raised two other issues that are not before this Court.

[5] Unpublished opinion per curiam, issued January 12, 2001 (Docket No. 217052)

[6] 465 Mich 874 (2001).

On remand, the Court of Appeals held that the trial court did not err in admitting this evidence, because "the statement at issue was made in the context of a conversation between former friends, which, as the trial court in this case found, was initiated by the defendant."[7]

Defendant again appealed to this Court, and we granted leave, directing the parties to address: "(1) whether defendant's statements to Officer Heintzelman constituted the interaction of custody and official interrogation, as discussed in *Illinois v Perkins*, 496 US 292 [110 S Ct 2394; 110 L Ed 2d 243] (1990), and (2) whether Officer Heintzelman was a state actor at the time defendant made the statements to him." 468 Mich 921 (2003).

II. STANDARD OF REVIEW

In order to determine whether a constitutional error occurred, we must first determine whether Heintzelman was a state actor, which is a mixed question of fact and law. We review for clear error a lower court's findings of fact, MCR 2.613(C), and review de novo questions of law. *People v Herron* , 464 Mich 593, 599; 628 NW2d 528 (2001).

III. DISCUSSION

A. STATE ACTOR ANALYSIS

The people argue that Heintzelman was not a state actor because he did not visit defendant in an official police capacity, but was invited to visit defendant as a former neighbor and

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[7] Unpublished opinion per curiam, on remand, issued February 12, 2002 (Docket No 217052), slip op at 5

friend. That defendant was unaware of Heintzelman's reserve deputy status when he asked to see him, however, does not end the inquiry.

In *Griffin v Maryland* , 378 US 130, 135; 84 S Ct 1770; 12 L Ed 2d 754 (1964), the Supreme Court held that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law."[8] It is clear from the

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[8] Although we agree with the dissent that not every act performed by someone who happens to be a police officer constitutes state action, it must be noted that the cases cited by the dissent in support can be distinguished from this case.

Only one case, *United States v McGreevy* , 652 F2d 849 (CA 9, 1981), involves a constitutional challenge. In *McGreevy* , the defendant alleged a Fourth Amendment violation because the Federal Express worker who searched his package also happened to be a police officer. The court rejected the Fourth Amendment claim on the ground that the FedEx worker was not acting under color of state law when he opened the package. The court noted that the worker did not obtain his FedEx job as a result of being a police officer and "carefully separated" the two jobs. *Id.* at 851. The same cannot be said for Heintzelman. At the time he questioned defendant, Heintzelman was present at defendant's maximum-security cell at 11:30 PM by virtue of his status as a sheriff's reserve deputy. He did nothing to "carefully separate" himself from his apparent authority.

The remaining cases cited by the dissent are civil claims brought under 42 USC 1983. The dissent does not explain why these civil cases, predicated on federal statute, should be dispositive for purposes of constitutional claims. Although the United States Supreme Court has held that conduct that is state action for constitutional purposes is action "under color of state law" for § 1983 purposes, it has never held that the opposite is true. In other words, conduct that fails to constitute action "under color of state law" for § 1983 purposes does not necessarily fail to represent state action for constitutional purposes. In *Nat'l Collegiate Athletic Ass'n v Tarkanian* , 488 US 179, 182 n 4; 109 S Ct 454; 102 L Ed 2d 469 (1988), the United States Supreme Court merely stated that in *that case* , in which the plaintiff claimed he had been deprived of his Fourteenth Amendment due process rights in violation of § 1983, "the under-color-of-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent." We read the footnote as merely setting forth the unremarkable conclusion that, for Fourteenth Amendment violations premised on violations of § 1983, the two state- action inquiries are equivalent. This case, however, involves a very different inquiry.

The other § 1983 cases cited by the dissent can be similarly distinguished. In *Barna v Perth Amboy* , 42 F3d 809 (CA 3, 1994), the plaintiffs brought a civil action under 42 USC 1983 as a result of an alleged assault by the defendant police officers. The assault occurred when one of the off-duty police officers thought he saw one of the plaintiffs strike his sister and intervened. The court held that this initial altercation was a family dispute and that the off-duty officers were therefore not acting under color of state law. *Id.* at 815. Because of the personal nature of the dispute, the court concluded that the use of the police-issued night stick in the fight, although objective

indicia of police authority, did not transform the personal family dispute into an action taken under color of state law.

Bosignore v City of New York , 683 F2d 635 (CA 2, 1982), involved an off-duty police officer who used his police-issued revolver to shoot his wife and then commit suicide. The wife survived and attempted to bring a claim under 42 USC 1983. The court rebuffed her attempt, stating simply that the officer was not acting under color of state law since his actions in shooting his wife and committing suicide were not committed in the performance of any actual or pretended duty, but were personal pursuits. *Id.* at 638- 639.

In *Delcambre v Delcambre* , 635 F2d 407 (CA 5, 1981), the plaintiff was assaulted by her brother-in-law, who also happened to be the police chief. The plaintiff's § 1983 action was dismissed because the Court found that the altercation arose out of family and political matters and that the plaintiff was neither arrested nor threatened with arrest. Under the circumstances, the court found that the family and political dispute was not conducted under color of state law. *Id.* at 408.

All the above cases involved truly personal matters. The same cannot be said here. It was only by virtue of his position as a governmental agent that Heintzelman was able to question defendant at the location and time he did. Further, given the decade that had lapsed without any contact between the two and Heintzelman's subsequent offer to Lieutenant McClellan to obtain more information, any claims that Heintzelman was solely acting out of concern for defendant's welfare are suspect.

record that Heintzelman possessed *actual* state authority — he was deputized as a Clare County sheriff's reserve deputy. The dispositive question, then, is whether Heintzelman purported to act under that authority.

The word "purport" means: "1. to present, esp. deliberately, the appearance of being; profess or claim . . . . 2. to convey, express or imply." *Random House Webster's College Dictionary* (2d ed). The record evidence shows that Heintzelman visited defendant in his full uniform, thus creating the appearance that he was a state actor. Further, Heintzelman received permission from a corrections officer to visit defendant late at night in his maximum-security cell. The people conceded at oral argument that an ordinary citizen would not have been granted permission under the same circumstances. Thus, it was only by virtue of his status as a reserve deputy that Heintzelman was granted direct access to defendant's maximum-security cell, a restricted area where only governmental agents are normally allowed to tread. Further, this access was granted late at night, a time when ordinary citizens are prohibited from visiting inmates.[9]

There is no evidence that Heintzelman sought to distance himself from his actual or apparent police authority. Instead, defendant was questioned in the middle of the night by a sheriff's reserve deputy (albeit one he had known a decade

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[9] Again, we stress that Heintzelman's visit to defendant at his maximum-security cell at 11:30 PM is significant not because it somehow means Heintzelman tried to "catch defendant off guard" as suggested by the dissent, but because *only* governmental agents were allowed access to maximum-security cells, particularly at that time of night.

earlier) in full uniform. Indeed, Heintzelman's actions during and after the questioning only reinforced his actual or apparent authority. During his "conversation" with defendant, Heintzelman twice brought up the subject of defendant's son in an apparent attempt to get defendant to answer Heintzelman's questions. Further, after he spoke to defendant, Heintzelman contacted the lieutenant in charge of the investigation, relayed the contents of the conversation, and offered to obtain more information. Finally, it is also telling that Heintzelman was not allowed any further contact with defendant for fear of violating defendant's Sixth Amendment rights.

The facts of this case distinguish it from *United States v Gaddy* , 894 F2d 1307 (CA 11, 1990), cited by the dissent. In *Gaddy,* the defendant's aunt was a police officer. Through her position as an officer, she learned that the defendant was in custody. A detective advised the aunt that it would be in her nephew's best interest to cooperate, but did not request that the aunt talk to the nephew. The aunt contacted the nephew from her home and encouraged him to speak. He agreed and spoke to officials after waiving his Fifth Amendment and Sixth Amendment rights.

In determining that the aunt was not a state actor, the court noted that the aunt was not part of the investigative team on the defendant's case and acted solely out of concern for his welfare. *Id.* at 1311. In contrast, here Heintzelman *was* part of the police team present for the recovery of the victim's body from defendant's former residence. Further, it cannot be said that Heintzelman was acting solely out of a concern for defendant's welfare. He had not seen or spoken to defendant in *ten years* , and, upon reporting the conversation to his superior, volunteered to obtain more information from defendant. Thus, the lack of any close relationship between Heintzelman and

defendant, along with Heintzelman's actions after speaking to defendant, distinguish this case from *Gaddy*.[10]

Taken together, the evidence shows that Heintzelman was possessed of state authority and purported to act under that authority. Therefore, under *Griffin* , his action is state action.

B. SIXTH AMENDMENT ANALYSIS

The next issue is whether Heintzelman's questioning of defendant violated the Sixth Amendment guarantee of the right to counsel. In *Edwards v Arizona,* 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981), the United States Supreme Court established the bright-line rule that an accused, having expressed a desire to deal with the police only through counsel, may not be subject to further interrogation by the authorities until counsel has been made available unless the accused initiates further communication. The initiation of a conversation related to the investigation, standing alone, is insufficient to establish a waiver of the previously asserted

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[10] Similarly, the facts of this case distinguish it from *Cook v Georgia* , 207 Ga 820; 514 SE 2d 657 (1999). First, although the defendant's father in *Cook* was an FBI agent, the FBI was not exercising jurisdiction over the case—it was purely a state matter. In contrast, here Heintzelman was not only a part of the police team present at the recovery of the victim's body, but was a part of the agency that had jurisdiction over the case. Further, it cannot be contended that Heintzelman's relationship with defendant, whom he had not seen or spoken to in a decade, is akin to that of a father and son.

right to counsel. We incorporated the *Edwards* rule in *People v Paintman,* 412 Mich 518; 315 NW2d 418 (1982), and the *Edwards* rule was extended to Sixth Amendment claims in *Michigan v Jackson* , 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

It is important to note that the Sixth Amendment may be violated by questioning that does not rise to the level of the custodial interrogation required under the Fifth Amendment. In *Fellers v United States* , 540 US ___; 124 S Ct 1019; 157 L Ed 2d 1016 (2004), a unanimous Supreme Court clarified that "an accused is denied 'the basic protections' of the Sixth Amendment 'when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of counsel.'" *Id.* at 4, citing *Massiah v United States* , 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). The Court continued: "We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases . . . and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard . . . ." *Id.* This is consistent with the Court's holding in *Michigan v Jackson* , *supra* at 632 n 5, that the Sixth Amendment provides a right to counsel even when there is no interrogation and no Fifth Amendment applicability.

Even under *Edwards* , however, the initiation of *any* verbal exchange with governmental agents is insufficient to permit further questioning. In *Oregon v Bradshaw,* 462 US 1039; 103 S Ct 2830; 77 L Ed 2d 405 (1983), a four-justice plurality ruled that communications were "initiated" for purposes of the *Edwards* rule by conversation that "represent[s] a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Id* . at 1045. The dissenting justices would

have defined "initiation" even more narrowly as a communication or dialog about the subject matter of the investigation. Pursuant to *Bradshaw*, the defendant must initiate communication concerning the investigation in order to avoid running afoul of the rule articulated in *Edwards*.[11]

We hold that Heintzelman's questioning of defendant violated the *Edwards* rule, as clarified in *Bradshaw*.[12] Even solely reviewing Heintzelman's testimony regarding his conversation with defendant, there is no proof evincing a desire on the part of defendant to pursue a discussion relating directly or indirectly to the investigation. Defendant merely initiated a social visit with his old friend and neighbor. It was Heintzelman, not defendant, who initiated all questioning relating to the investigation and charges against defendant for the murder of Randy Laufer.

In fact, Heintzelman testified that he tried at least *four separate times* to initiate questioning regarding the investigation: (1) he initially volunteered that defendant's son was also incarcerated, but defendant did not respond; (2) Heintzelman expressly asked defendant if he did what he was

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[11] Further, even if a defendant initiates a conversation related to the investigation, the state must still establish that the defendant made a voluntary, knowing, and intelligent waiver of his right to have counsel present at questioning under the totality of the circumstances. *Bradshaw* at 1046.

[12] Indeed, the people conceded at oral argument that if Heintzelman was a state actor, the admission of defendant's statements to Heintzelman violated defendant's Sixth Amendment rights.

charged with, and again defendant did not respond; (3) Heintzelman told defendant that the police thought defendant's son was involved in the murder, at which point defendant responded that "if they try to pin it on [my son], I'll let 'em fry my ass"; and (4) Heintzelman again expressly asked defendant if he committed the murder, and defendant responded "Dean, it was bad. It was bad." Thus, not only did defendant not demonstrate any desire to talk about the subject of the investigation, he failed or refused to answer Heintzelman's first two questions regarding the murder. It was only when Heintzelman continued to press defendant that defendant finally answered. Because defendant did not demonstrate a desire to discuss matters directly or indirectly related to the investigation, Heintzelman's questioning was in violation of defendant's Sixth Amendment rights.[13]

CONCLUSION

We hold that Heintzelman was a state actor and deliberately elicited incriminating statements from defendant in violation of the bright-line rule, established in *Edwards* and clarified in *Bradshaw* , that protects a defendant against any subsequent government-initiated questioning following the exercise of the defendant's Sixth Amendment rights. Heintzelman both possessed actual state authority and

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[13] We clarify that we do not hold, as the dissent suggests, that a sheriff's reserve deputy may *never* ask a friend about a crime without running afoul of the Sixth Amendment. Rather, we hold only that if, at the time of the questioning, that sheriff's reserve deputy is a state actor and questions the defendant in violation of the *Edwards* rule as clarified in *Bradshaw*, that questioning violates the Sixth Amendment

purported to act under that authority; therefore, his action is considered state action. Although defendant may have asked to speak with Heintzelman, at no point did defendant express a desire to discuss subjects directly or indirectly related to the investigation. Therefore, defendant's statements in response to Heintzelman's questioning regarding the murder should not have been admitted at trial. We have already determined that the error was not harmless beyond a reasonable doubt; therefore, we reverse the decision of the Court of Appeals and remand for a new trial.

Maura D. Corrigan
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 121300

JOHN RODNEY MCRAE,

Defendant-Appellant.

MARKMAN, J. (*dissenting*).

I respectfully dissent. The majority is reversing defendant's conviction of first-degree murder on the ground that the trial court erred in admitting a statement that defendant made to Dean Heintzelman, defendant's former neighbor and friend, who happens to volunteer as a part-time, reserve police officer. Specifically, the majority concludes that this admission violated defendant's Sixth Amendment right to counsel. I strongly disagree. In my judgment, defendant's Sixth Amendment right to counsel was not violated because, when Heintzelman spoke to defendant, he was acting as a friend, not as a police officer. Thus, there was no governmental action and, therefore, no violation of defendant's Sixth Amendment right to counsel. Accordingly, I would affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Defendant was arrested and charged with first-degree murder. The police advised defendant of his *Miranda*[1] rights, and defendant told the police that he did not wish to answer any questions without his attorney present. While defendant was incarcerated awaiting trial, he requested a visit from his former neighbor and friend, Dean Heintzelman. Heintzelman owns an excavating company and in his spare time volunteers as a part-time, reserve officer.[2] According to Heintzelman, the visit began by defendant talking about and showing Heintzelman pictures of his son and his son's wife and baby.[3] At some point, Heintzelman asked defendant whether he committed the murder with which he was charged. Defendant did not answer. After further conversation, Heintzelman again asked defendant if he was involved in the murder. Defendant hung his head and said, "It was bad, Dean. It was bad."

Defendant brought a motion to suppress Heintzelman's testimony regarding this statement, alleging that the statement was obtained in violation of his Fifth Amendment right to be

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[1] *Miranda v Arizona* , 385 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] When defendant initially requested this visit, he did not know that Heintzelman was a reserve police officer. However, Heintzelman had just finished transporting a prisoner before he came to visit defendant and, thus, was wearing his police uniform during his visit with defendant.

[3] An inmate who was present during this visit also testified that defendant and Heintzelman's conversation began with defendant talking about his family.

free from compelled self-incrimination and his Sixth Amendment right to counsel. The trial court denied defendant's motion to suppress. Following a jury trial, defendant was convicted of first-degree murder. The Court of Appeals affirmed, concluding that, even if the admission of the statement was error, it was harmless error.[4] This Court then vacated the Court of Appeals judgment in part, concluding that, if there was error, the error was not harmless beyond a reasonable doubt.[5] On remand, the Court of Appeals again affirmed, concluding that the trial court did not abuse its discretion in admitting the statement.[6]

II. STANDARD OF REVIEW

Constitutional issues are reviewed de novo, while findings of fact are reviewed for clear error. *People v LeBlanc* , 465 Mich 575, 579; 640 NW2d 246 (2002). "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel* , 469 Mich 409, 412; 670 NW2d 659 (2003).

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[4] Unpublished opinion per curiam, issued January 12, 2001 (Docket No. 217052).

[5] 465 Mich 874 (2001).

[6] Unpublished opinion per curiam, issued February 12, 2002 (Docket No. 217052).

III. ANALYSIS

After a defendant has been indicted, his Sixth Amendment right to assistance of counsel attaches. *Massiah v United States* , 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964).[7] Accordingly, a defendant's incriminating statements, deliberately elicited by governmental agents after the defendant has been indicted and in the absence of defendant's counsel, are not admissible at trial unless the defendant himself initiated the conversation concerning the investigation with the governmental agents. *Michigan v Jackson* , 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). The Sixth Amendment right to counsel is broader than the Fifth Amendment right to counsel in the sense that the Sixth Amendment provides a right to counsel beyond custodial interrogations. *Fellers v United States* , 540 US ___; 124 S Ct 1019; 157 L Ed 2d 1016 (2004).

However, "[c]onstitutional protections apply to governmental action only . . . ." *Grand Rapids v Impens* , 414 Mich 667, 673; 327 NW2d 278 (1982). Therefore, one acting as a private individual, rather than as a governmental actor, cannot violate an accused's Sixth Amendment right to counsel. Further, merely because a person may, in some instances, be considered a governmental actor, does not mean that this person is always a governmental actor. See *Polk Co v Dodson* , 454 US 312, 324-325; 102 S Ct 445; 70 L Ed 2d 509 (1981)(although a public defender is considered a state actor when performing some official duties, he is considered a private actor when he is representing a criminal defendant).

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[7] "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defense." US Const, Am VI. See also Const 1963, art 1, § 20.

Accordingly, not every act performed by an individual who happens to be a police officer constitutes state action. See, e.g., *Barna v Perth Amboy* , 42 F3d 809, 817 (CA 3, 1994)(an off-duty police officer who used his night stick in a fight was not a state actor); *Bonsignore v City of New York* , 683 F2d 635, 638-639 (CA 2, 1982)(an off-duty police officer's use of a police revolver to shoot his wife was not state action); *Delcambre v Delcambre* , 635 F2d 407, 408 (CA 5, 1981)(an on-duty police officer's assault of the plaintiff at a police station was not state action because it arose out of a personal dispute and the officer neither arrested nor threatened to arrest the plaintiff); *United States v McGreevy* , 652 F2d 849, 851 (CA 9, 1981)(a police officer who opened a package while working for Federal Express was not a state actor).[8]

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[8] The majority observes that all the cases that I cite are distinguishable from the instant case. If, by this observation, the majority means that none of these cases involves a former neighbor and friend who happens also to be a part-time, volunteer, reserve police officer, then I agree. However, the majority has likewise failed to cite any case in support of its own conclusions that involves a former neighbor and friend who happens also to be a part- time, volunteer, reserve police officer. The majority's response to this dissent constitutes nothing more than a recognition that the circumstances of the instant case are unusual ones. What the cases that I cite *do* stand for is the proposition that not everything that a person who is a police officer does constitutes state action.

The majority further criticizes some of these cases on the ground that they address whether conduct constitutes state action for the purpose of 42 USC 1983, while the issue here is whether Heintzelman's conduct constitutes state action for the

In *United States v Gaddy* , 894 F2d 1307 (CA 11, 1990), the defendant's aunt, who happened to be a police officer, persuaded the defendant to confess to the police. The United States Court of Appeals for the Eleventh Circuit concluded that she was acting as the defendant's aunt, not as a state actor, because she was not part of the investigative team on her nephew's case, she was not directed by a superior to contact her nephew, there was no evidence that she was acting in the normal course of her duties when she initiated contact with her nephew, and she made no written report following her communication with her nephew.[9]

The facts of the instant case are similar, but even more compelling. Heintzelman was not acting in the normal course of his duties when he talked with defendant—his normal duties included transporting prisoners, not questioning them;

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purpose of the Sixth Amendment. However, the United States Supreme Court has stated that, if conduct constitutes state action for the purpose of the Constitution, it necessarily constitutes state action for the purpose of § 1983. *Brentwood Academy v Tennessee Secondary School Auth Assoc*, 531 US 288, 295 n 2; 121 S Ct 924; 148 L Ed 2d 807 (2001). Contrary to the majority's contention, the United States Supreme Court has held that the opposite is also true. *Nat'l Collegiate Athletic Ass'n v Tarkanian* , 488 US 179, 182 n 4; 109 S Ct 454; 102 L Ed 2d 469 (1988)("the under-color-of-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth amendment are equivalent").

[9] The Georgia Supreme Court looked at these same factors in concluding that the defendant's father, who happened to be an FBI agent, acted as a father, not as a state actor, when he asked his son if he had shot the victim. *Cook v Georgia* , 270 Ga 820; 514 SE 2d 657 (1999).

Heintzelman's duties as a part-time, reserve police officer were entirely noninvestigative in nature;[10] Heintzelman was not part of the investigative team on defendant's case;[11] Heintzelman was not directed by a superior or anyone else to contact defendant; Heintzelman was requested by defendant himself to speak with him; Heintzelman was not acting under the direction of the investigating police officers; Heintzelman was not acting in concert with the investigating police officers; Heintzelman asked no follow-up questions of defendant as would have any other minimally trained investigative officer; and Heintzelman made no written report following his conversation with defendant.[12]

The majority cites *Griffin v Maryland* , 378 US 130, 135; 84 S Ct 1770; 12 L Ed 2d 754 (1964), for the proposition that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action."

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[10] When asked what his duties as a reserve police officer included, Heintzelman responded: "I go on transport, transport prisoners. We take care of ball games, do security at ball games. We help with visitation at the jail. That sort of stuff."

[11] Although, as the majority states, Heintzelman " *was* part of the police team present for the recovery of the victim's body from defendant's former residence," *ante* at 10-11, he was there, not in any sort of investigative capacity, but simply as a volunteer to help guard the scene until the state police forensic team arrived.

[12] Although the prosecutor further asserted at oral argument that Heintzelman did not report anything about his conversation with defendant to the investigating officers until nearly a week after it occurred, I can find no confirmation of this fact in the record. However, the record is similarly bereft of evidence that this conversation was promptly reported to the investigating officers.

I agree that whether Heintzelman purported to act under state authority is the dispositive question.

In *Griffin* , an amusement park employee identified himself as a deputy sheriff and ordered the petitioners to leave the amusement park. By identifying himself as a state officer and ordering the petitioners to leave the park, he clearly purported to act under state authority and, thus, his action was effectively state action.

Unlike the officer in *Griffin,* Heintzelman did not purport to act under state authority. Rather, he purported to do nothing more than act as a friend. He came to see defendant at defendant's request, he spoke to defendant about their families, and he asked defendant, as a friend might do when his friend has been accused of murder, what was going on. Further evidence that Heintzelman was acting as a friend, not as a police officer, is that when Heintzelman asked defendant if he was involved and defendant said, "Dean, it was bad," rather than pressing defendant for further evidence of guilt, as anyone acting as a police officer would certainly do, he simply left. Heintzelman behaved, not as a police officer would, but as a disappointed friend would when confronted with an incriminating statement made by one's friend concerning a heinous murder.[13]

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[13] The majority states that the fact that *after* Heintzelman was confronted with defendant's incriminating statement, he "offered to obtain more information" from defendant evidences that Heintzelman was acting, not as a friend, but as a state actor when he spoke with defendant. *Ante* at 10. If Heintzelman had, in fact, spoken with defendant as he offered to do, this would certainly be relevant in determining whether the subsequent conversation with defendant

The majority's conclusion that Heintzelman acted as a state actor when he spoke with defendant is based entirely on the fact that Heintzelman served as a part-time, reserve police officer, and that when he spoke with defendant it was late at night and he was wearing a police uniform. As explained above, not everything a police officer does, regardless of when it is done and regardless of the circumstances under which it is done, constitutes state action. Not even everything a police officer, who happens to be uniformed, does constitutes state action. That Heintzelman happened to be wearing a uniform when he spoke with defendant does not transform Heintzelman's personal actions into state actions.[14] Likewise, the fact that their conversation took place after normal visiting hours does not transform Heintzelman's personal conversation with defendant into state action.[15]

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constituted state action. However, the fact that Heintzelman, *after* being confronted with defendant's incriminating statement, decided that he would be willing to speak to defendant in order to help the investigating officers, sheds no light on whether Heintzelman went to see defendant in the first place as a governmental agent or as a friend. Indeed, if anything, Heintzelman's offer of future assistance to the officers implies that his initial conversation with defendant had a different purpose.

[14] Heintzelman was wearing a uniform, not because he was attempting to intimidate defendant, or to communicate his public authority, but because he came to visit defendant at defendant's request at a time when he happened to be in uniform.

[15] Heintzelman visited defendant at around 11:00 P.M., not because he was attempting to catch defendant off guard, but because he happened to be at the jail where defendant was incarcerated at that time since he had just finished transporting

Apparently, the majority would have no problem admitting defendant's statement to Heintzelman if Heintzelman had first gone home, changed his clothes, and come back the next morning to speak with defendant. However, in my judgment, it is difficult to comprehend the significance the majority gives these factors in determining whether a jury will or will not have access to defendant's statement.

IV. CONCLUSION

The majority has concluded that someone who happens to have volunteered as a part-time, reserve police officer cannot ask a friend about a crime with which he has been charged without running afoul of the Sixth Amendment.[16] As a

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a prisoner there. The majority states that the fact that their conversation took place so late is relevant because only governmental agents would have had access to defendant at that time of night. However, that this conversation took place several hours before or after normal visiting hours does not transform this private conversation into state action. That the police officer in *Barna* only had access to a police-issued night stick because he was a police officer, did not make his use of this night stick in a fight state action, just as the fact that the officer in *Bonsignore* only had access to a police-issued revolver because he was a police officer did not make his use of this revolver to shoot his wife state action.

[16] The majority rejects this characterization of its holding, and replies that it is merely concluding that a part-time, reserve police officer can never ask a friend about a crime only while acting as a state actor. Of course, such a reply is a mere tautology since the very issue before this Court is whether Heintzelman was a state actor. The majority's references to *Edwards* and *Bradshaw* are similarly circular. To

result, a clearly incriminating statement made about a brutal murder—a statement made voluntarily and fully in compliance with the requirements of *Miranda v Arizona*[17]—is to be excluded from the justice system. And defendant's jury of peers—tasked with carrying out one of the gravest responsibilities of citizens in a democracy, determining the truth of a criminal charge—will be required to carry out this responsibility while being deprived of a compelling piece of evidence, freely given words from defendant's own mouth.

When all the facts are considered, it is clear that Heintzelman spoke to defendant as a friend, not as a governmental actor and, thus, Heintzelman could not have violated defendant's Sixth Amendment right to counsel. Therefore, I would affirm the judgment of the Court of Appeals.

Stephen J. Markman
Elizabeth A. Weaver

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repeat, under the majority's analysis, a part-time, reserve police officer would not be able to ask a friend about a crime with which he has been charged without running afoul of the Sixth Amendment.

[17] By stating that there was no *Miranda* violation, I am not implying that compliance with *Miranda* was required. Indeed, for the same reason that I conclude that defendant's Sixth Amendment right to counsel was not violated—there was simply no state action—I would also conclude that his Fifth Amendment right was not violated. The reference to *Miranda* is simply to underscore the utter lack of coercion surrounding the statement that the majority is suppressing.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 12, 2002

v

No. 217052
Clare Circuit Court
LC No. 98-001151-FC

JOHN RODNEY MCRAE,

Defendant-Appellant.

ON REMAND

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

This case is before us for the second time. In our prior opinion, we affirmed defendant's conviction of first-degree premeditated murder, MCL 750.316(1)(a). *People v McRae*, unpublished opinion per curiam of the Court of Appeals, issued 01/12/2001 (Docket No. 217052). In that appeal, defendant challenged the trial court's denial of his motion to suppress evidence of a statement he allegedly made to his former neighbor, who was employed as a reserve deputy sheriff, on the grounds that it violated his right against compelled self-incrimination and his right to counsel under the United States and Michigan constitutions.[1] We concluded that even if the trial court erred in admitting the statement, the error was

[1] Defendant also raised other issues which we found to be without merit and on which the Supreme Court denied leave to appeal.

harmless beyond a reasonable doubt in light of the evidence presented at trial. Defendant filed an application for leave to appeal with the Supreme Court. In lieu of granting leave to appeal, the Supreme Court determined that if the trial court erred in this regard, the error was not harmless, and remanded the matter for our consideration whether there was error. *People v McRae*, 465 Mich 874 (2001). Having reviewed the case in accordance with the Supreme Court's directive, we find no error and affirm.

The alleged statement that defendant moved to suppress was made during a conversation with his former neighbor, Dean Heintzelman, at the Clare County jail where defendant was incarcerated awaiting trial. Heintzelman was employed as a reserve officer for the Clare County Sheriff's Department. Heintzelman had been defendant's neighbor when defendant lived in the area years ago, and Heintzelman described him as a friend that he knew "fairly well" at that time. Heintzelman was aware that defendant was charged with first-degree murder and was being held at the jail. Heintzelman learned from his mother, who was also a reserve officer, that defendant wanted to see him on the basis of a conversation she had had with defendant's wife, and it was his understanding that defendant wondered why Heintzelman had not come to see him. Although Heintzelman did not know why defendant wanted to see him, he believed that defendant "just [ ] wanted company."

One night after Heintzelman had finished transporting a prisoner, he told the officer on duty that defendant had been asking to see him, and Heintzelman asked the officer to take him back to defendant's cell. Heintzelman was wearing his sheriff's uniform. Heintzelman remained outside defendant's cell. He and defendant shook hands and talked about their families. Heintzelman asked defendant about his son, and defendant showed Heintzelman pictures of his son's wife and

baby. At some point in the conversation, Heintzelman asked defendant about his involvement in the charged offense. Defendant did not answer. They continued to talk about defendant's son. Again Heintzelman asked defendant, "[D]id you do it?" According to Heintzelman, defendant hung his head and responded, "Dean, it was bad. It was bad." That was the end of their discussion and Heintzelman had no further contact with defendant. Heintzelman later relayed the content of their conversation to another officer.

The prosecution notified defendant that it intended to introduce evidence of the statement at trial. Defendant moved to suppress the statement on the grounds that its admission violated his constitutional rights to counsel and against compelled self-incrimination because the statement was elicited without the presence of counsel or the requisite warnings. The prosecution argued that defendant waived his rights by requesting that Heintzelman come see him and also that Heintzelman's employment as a reserve officer was irrelevant in the context of their meeting, which was a casual conversation between former neighbors.

At the *Walker*[2] hearing, the trial court heard testimony about the circumstances surrounding Heintzelman's conversation with defendant. Heintzelman testified that he had been defendant's neighbor before defendant moved out of the area in 1987, and that at that time they were good friends. Heintzelman learned from his mother that she had spoken with defendant's wife, Barbara McRae, and Barbara indicated that defendant would like to see Heintzelman. According to Barbara, defendant "wanted to have a friendly conversation with our neighbors." Barbara claimed to be unaware that

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[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Heintzelman was associated with the Sheriff's Department. Heintzelman testified that he did not give defendant *Miranda*[3] warnings because they were "talking like friends."

Defendant testified at the hearing. When questioned whether he had requested that Heintzelman visit him in jail, defendant equivocated, "Not exactly." Defendant denied knowing that Heintzelman was associated with the sheriff's department. Defendant stated that Heintzelman immediately asked him: "John, John, now did you do it? Didn't you do it? Do you remember what happened? Did you forget it?" Defendant "was trying to be very cautious as to what [he] said." Defendant testified that he shook his head and said, "No, not anything at all like they're trying to make it out to be." They then proceeded to talk about their families. Defendant testified that he had previously been given *Miranda* warnings, and that he had invoked his right to remain silent. At the time of the conversation, defendant was represented by counsel. Previously, defendant had told the police that he did not wish to answer any questions and he wished to consult with an attorney. He testified that he never communicated to the sheriff's department that he had changed his mind and that he wanted to talk about the matters that brought him there.

Kerry Kocsis was in the same wing of the jail as defendant and overheard the conversation between defendant and Heintzelman. He testified that they talked about defendant's son, and defendant's son's children, and how defendant was doing in the jail. Kocsis heard Heintzelman

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

asked defendant "Did you do it?" Kocsis first stated that defendant did not answer. Later he said that defendant responded "No."

At the conclusion of the hearing, the trial court made the following findings and ruling:

> . . . [I]t seems pretty evident to the fact that [Heintzelman] was back there at the request of the Defendant. He wanted to talk to him. The Defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do.

The trial court determined that *Miranda* warnings were not required and denied defendant's motion to suppress the statement.[4]

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[4] We note as an aside that defendant's motion to suppress was somewhat problematic, inasmuch as defendant sought to challenge the constitutionality of the circumstances surrounding the elicitation of a statement that defendant did not admit to making. The *Walker* hearing testimony offered four versions of what transpired between Heintzelman and defendant. Heintzelman testified that when asked about his culpability, defendant said: "Dean, it was bad. It was bad." This is the alleged statement defendant sought to have suppressed. However, defendant testified that he responded to Heintzelman by saying that it was "not anything at all like they're trying to make it out to be." Kocsis gave conflicting testimony; Kocsis first stated that defendant said nothing in response to Heintzelman's question, but later testified that

We review a trial court's findings of fact regarding a motion to suppress evidence for clear error, and review the trial court's ultimate decision on the motion de novo. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000); *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). See also MCR 2.613(C). Clear error exists if we are left with a definite and firm conviction that a mistake has been made. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). "An appellate court must give deference to the trial court's findings at a suppression hearing." *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

"In *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court created a set of prophylactic safeguards to insure protection of the Fifth Amendment right to be free from compelled self-incrimination during custodial interrogation." *Cheatham*, *supra* at 10. "[T]he police must advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001). See Const 1963, art 1, § 17. "*Miranda* protects defendants against governmental coercion leading them to surrender rights

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defendant said simply, "No." The trial court proceeded to rule on the motion despite defendant's contradictory testimony on this point at the hearing. We now engage in the somewhat paradoxical task of reviewing a ruling on a motion to suppress when defendant's own testimony contradicts that he made the statement that he sought to have suppressed.

protected by the Fifth Amendment; it goes no further than that." *Cheatham*, *supra* at 11, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986).

It has become axiomatic that *Miranda* warnings need only be given in cases involving custodial interrogations. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995); *People v Hoffman*, 205 Mich App 1, 8; 518 NW2d 817 (1994). This Court has recognized that "*Miranda* must be strictly enforced, but only in 'those types of situations in which the concerns that powered the decision are implicated.'" *Id.*, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984). Accordingly, in the case at bar the issue to be resolved is whether defendant was subjected to custodial interrogation to trigger the requirements of *Miranda*. *Anderson*, *supra* at 532. "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody. *Anderson*, *supra*, citing *Illinois v Perkins*, 496 US 292, 296; 110 S Ct 2394; 110 L Ed 2d 243 (1990). "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Anderson*, *supra*, quoting *Rhode Island v Innis*, 446 US 291, 300; 100 S Ct 1682; 64 L Ed 2d 297 (1980). See *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

The Sixth Amendment to the United States Constitution as well as the Michigan Constitution guarantee the right to counsel. US Const Am VI; Const 1963, art 1, § 20. The Sixth Amendment right to counsel attaches at or after the initiation of adversary judicial proceedings against the defendant, *People v Johnson*, 215 Mich App 658, 664; 547 NW2d 65 (1996), and applies to all critical stages of the prosecution. *People v Crusoe*, 433 Mich 666, 685; 449 NW2d 641 (1989). "A critical stage of the proceedings includes government efforts to

elicit information from the accused concerning the charged crime." *People v Riggs*, 223 Mich App 662, 677; 568 NW2d 101 (1997) (Smolenski, J.), citing *Michigan v Jackson*, 475 US 625, 630; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

In the case at bar, it is undisputed that at the time of Heintzelman's conversation with defendant, defendant was in custody for purposes of *Miranda*. Nor is it disputed that Heintzelman did not give defendant *Miranda* warnings. Also, because formal proceedings had commenced, defendant's Sixth Amendment right to counsel had attached. *Johnson*, *supra* at 664.

The trial court correctly identified the threshold issue, i.e., "why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at that point in time, or was he back there at the request of the Defendant[?]". This is the relevant inquiry in this case because "constitutional protections apply only to governmental action." *Anderson*, *supra* at 533. "A person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *Id.*

Defendant advances arguments that are interesting but unsupported by the record. Defendant argues that Heintzelman's employment as a reserve sheriff's deputy placed him in the status of a police officer for purposes of his conversation with defendant despite Heintzelman's claim that he visited defendant at defendant's request and on the basis of their friendship. Although defendant asserts that Heintzelman visited defendant "during the course of his duties as a reserve police officer," the record establishes only that Heintzelman visited defendant after he had finished transporting a prisoner, he thought it was a good time to visit defendant, and defendant had been asking to see him. Although the nature of

Heintzelman's duties as a reserve officer is pertinent to this determination, see, e.g., *Anderson*, *supra*; *People v Robledo*, 832 P 2d 249 (Colo, 1992), the record is void of any evidence regarding the specific duties the job entails other than the transportation of prisoners. The record provides no indication of whether the position comprises any investigatory responsibilities. See *Anderson*, *supra* at 534.

Nor does the record support defendant's contention that Heintzelman used his friendship with defendant to elicit an incriminating statement or that Heintzelman was seeking information at the behest of investigating officers. On the contrary, the evidence supported the trial court's finding that Heintzelman visited defendant at defendant's request. Although the testimony differed regarding the point in the conversation at which Heintzelman inquired about defendant's involvement in the charged offense, Heintzelman, Kocsis, and defendant all testified that the conversation included talk of their families and defendant's son, thus suggesting the social aspect of the visit, as Heintzelman testified. In short, the record is void of any suggestion of the type of police coercion against which *Miranda* was intended to protect. *Cheatham*, *supra* at 10-11 ("The stated goal of *Miranda* is to protect against the inherently coercive nature of custodial interrogation.")

Defendant relies on cases involving security guards or off-duty police officers and addressing whether they are state actors for purposes of *Miranda*. None of the cases defendant cites address circumstances similar to those presented here in which the statement at issue was made in the context of a conversation between former friends which, as the trial court in this case found, was initiated by the defendant. Thus, they are not helpful to the resolution of the matter before us.

We conclude that the trial court did not clearly err in its findings, and that the court did not err in denying defendant's motion to suppress his statement.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Hilda R. Gage

Order
Entered: September 19, 2001

Michigan Supreme Court
Lansing, Michigan

118743

Maura D. Corrigan
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 118743
COA: 217052
Clare CC: 98-001151

JOHN RODNEY McRAE,

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal from the January 12, 2001, decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE, in part, the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the defendant's claim of error with regard to the testimony of witness Heintzelman concerning defendant's alleged statement. In its opinion in this matter, the Court of Appeals, while declining to decide whether there was in fact error, went on to decide that if

there had been error, it was harmless beyond a reasonable doubt. We disagree. If the admission of that statement was error, the error was not harmless beyond a reasonable doubt. Accordingly, on remand, the Court of Appeals shall directly decide whether the admission of this testimony was error and, if it decides that it was, shall reverse the defendant's conviction and remand for a new trial. In all other respects, leave to appeal is DENIED.

We do not retain jurisdiction.

Cavanagh and Kelly, JJ., would grant leave to appeal.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 12, 2001

v

JOHN RODNEY McRAE,

Defendant-Appellant.

No. 217052
Clare Circuit Court
LC No. 98-001151-FC

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). The trial court sentenced him to life imprisonment without parole. Defendant appeals as of right. We affirm.

The fifteen-year-old male victim was reported missing in 1987. The victim's skeletal remains were discovered in 1997 on property where defendant lived at the time of the victim's disappearance. The prosecution alleged at trial that defendant killed the victim, performed sexually sadistic acts on him, dismembered his body and then buried it under a pile of goat manure to evade cadaver dogs. Defendant denied that he killed the victim, claiming that he had moved out of the state before the victim's death.

Defendant first argues that the trial court abused its discretion in admitting evidence that he murdered, partially dismembered, and buried another young boy in 1950. The trial court ruled that the evidence was admissible under MRE 404(b) to prove defendant's motive, intent, premeditation and deliberation. This Court reviews a trial court's decision to admit other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

Pursuant to MRE 404(b)(1) evidence of other crimes, wrongs, or acts is admissible if the evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit a crime (2) relevant to an issue of fact or consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Accord *Crawford*, *supra* at 385; *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Only one of the purposes for which the other-acts evidence is offered "needs to be a proper, noncharacter reason that compels admission for the testimony . . . ." *Id.* at 501.

Contrary to defendant's contention, the prosecutor did not offer or use the contested evidence to establish that he acted in conformity with a propensity to commit bad acts. Rather, the prosecution used the evidence to counteract defendant's general denial that he murdered the victim by establishing that the murder was motivated by sexual sadism. See *Starr supra* at 501. Proof of motive in a prosecution for murder, although not essential, is always relevant, and

evidence of other acts to prove motive is among the purposes for which such evidence is expressly admissible under MRE 404(b)(1). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). "Motive" for purposes of 404(b) was defined in *Hoffman*, *supra* at 106; 570 NW2d 146 (1997) as:

> Cause or reason that moves the will and induces action. An inducement, or that which leads or temps the mind to indulge in a criminal act. [] I n common usage intent and "motive" are not infrequently regarded as one and the same thing. In law there is a distinction between them. "Motive" is the moving power that impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act. [Citations omitted.]

In *Hoffman*, this Court held that the trial court did not abuse its discretion in admitting testimony from two women whom the defendant had allegedly assaulted and battered and to whom he had expressed a general hatred toward women to establish that the defendant's actions against the victim were motivated by misogyny (hatred of women). *Id.* at 104-110. In rejecting the defendant's contention that the evidence was only relevant to establish his character or propensity toward violence, this Court held that the evidence was "relevant and material to defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim." *Id.* at 107, 109-110. This Court also noted that "absent the other-acts evidence establishing motive, the jurors may have found it difficult to believe the victim's testimony that defendant committed the depraved and otherwise inexplicable actions" and that the evidence "also tends to counter defendant's self-serving

testimony that the victim provoked the incident by stealing his money." *Id.* at 110.

In this case, several prosecution witnesses testified that the victim's skeletal remains contained numerous cut marks; that some marks indicated a successful attempt to cut the body in half in the lumbar region; that there were at least three cut marks on the inside of the sacrum in an up and down pattern; that the victim's foot bones were found inside his socks with a ropes tied around their tops; and that the victim's unbuttoned and unzipped blue jeans were found without leg bones inside them. Clinical and forensic psychologists testified that the cuts in the sacrum suggesting penetration of the anal or urogenital area with a knife, ropes indicating that the victim may have been restrained prior to death, and the blue jeans without leg bones suggesting that the victim was naked except for socks, constituted compelling evidence that defendant's actions were motivated by sexual sadism.

In an attempt to provide an explanation for why defendant perpetrated this seemingly random and inexplicable crime, *Hoffman*, *supra* at 108, the prosecutor presented experts who drew the same conclusion with respect to the 1950 homicide in which defendant: choked the 8½ year-old victim; pulled his underwear and pants down almost to the knees; pulled his shirt up to the rib cage; slashed his throat and body; nearly severed his penis; and, may have inflicted an anal wound. As in *Hoffman*, this evidence established more than character or propensity, was "relevant and material to defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim," and absent evidence establishing motive, the jury may have found it difficult to believe that defendant committed the depraved and otherwise inexplicable crime. *Id.* at 107, 109-110. Under these circumstances, we hold that the evidence was properly

admitted to establish defendant's motive for committing the instant offense, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

We also hold that the evidence would have been admissible for the proffered purpose of establishing defendant's identity as the perpetrator of the crime. Where other acts evidence is offered to show identification through modus operandi, this Court continues to apply the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982). *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998); see also *People v Smith*, ___ Mich App ___; ___ NW2d ___ (Docket No. 209326, issued 12/15/00), slip op pp 7-8. Other-acts evidence is admissible under *Golochowicz* if "(1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice." *Ho*, *supra* at 186, citing *Golochowicz*, *supra* at 207-209.

Here, defendant contested his identity as the perpetrator of the offense at issue, and we are persuaded that the instant offense and the offense for which he was convicted in 1951 shared special qualities which tended to prove his identity. *Smith*, *supra* at slip op pp 8-9; *Ho*, *supra* at 187. Both offenses involved prepubescent males whom defendant knew, repeated assaults with a knife, razor or other sharp object, efforts or success at dismemberment, evidence suggesting sexually sadistic motivations, and the burial of both bodies in places close to defendant. In light of these strong similarities, we do not find the disparities in the victims' ages, the likely depths of the graves, and the lack of proximity in time and location dispositive here. See *Smith*, *supra* at slip op pp 8-9 (holding

that there were sufficient similarities tending to prove that the same assailant committed both crimes based on less evidence than that presented here). Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where there were no eyewitnesses to testify at trial and there was strong evidence linking defendant to both crimes. *Ho*, *supra* at 187.

Defendant next argues that the trial court erred in admitting statements he made to his cellmate while in prison. Defendant contends that their admission violated his constitutional right to counsel because the evidence suggested that the police placed the cellmate with him knowing that he would elicit incriminating statements outside the presence of counsel. Although defendant filed a pretrial motion to exclude the evidence and sought to adjourn trial to investigate the matter, there is no indication that he obtained a ruling regarding their admissibility, that he requested a hearing on the issue, or that he objected to them at trial. Our review of this unpreserved issue is therefore limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

On this record, we cannot conclude that the police deliberately placed the inmate in defendant's cell to elicit incriminating statements as an agent for the police or that they "intentionally created a situation likely to induce [defendant] to make incriminating statements without the assistance of counsel." *United States v Henry*, 447 US 264, 270, 274; 100 S Ct 2183; 65 L Ed 2d 115 (1980); see also *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986); *Massiah v United States*, 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). In support of his contention, defendant makes much of the fact that the cellmate's plea agreement

provided that the prosecution would consider a sentencing agreement "based upon [his] assistance with ongoing investigations," that he was eventually only sentenced to concurrent terms of six months in jail for serious crimes, and that he allegedly had an "ongoing relationship" with a deputy at the jail. However, the cellmate also testified that: he did not know about defendant at the time he entered his plea agreement; that he was moved into defendant's cell due to an altercation with another inmate; that he did not ask defendant questions about his case; that the first time he ever heard anything about defendant's crime was from defendant himself; that he decided to tell police what defendant told him because "the way [defendant] talked about [the crime] was just sick . . . . [j]ust weighed heavy on my mind"; and, that he did not ask for or expect or receive any favors from the state for the information. Further, although the cellmate spoke with a deputy three or four times during his stay in jail, he only testified that he spoke with him "a small amount" regarding defendant's case. The cases defendant cites are distinguishable. See, e.g., *Maine v Moulton*, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481 (1985); *Henry*, *supra*; *Massiah*, *supra*; *United States v Brink*, 39 F 3d 419 (CA 3, 1994). Defendant has therefore failed to demonstrate that the admission of the cellmate's testimony constituted a plain error that affected his substantial rights. *Carines*, *supra* at 763-764.

For the same reasons, defendant has not established that his trial counsel's failure to obtain a ruling on his motion to exclude the cellmate's testimony was objectively unreasonable or prejudicial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Lastly, defendant argues that the trial court erred in denying his motion to suppress his statement to his former neighbor who came to the jail at defendant's request in his

reserve deputy sheriff uniform and questioned him about his guillt. Defendant maintains its admission violated his constitutional rights to counsel and against compelled self-incrimination because the statement was elicited without the presence of counsel or the requisite warnings. Following a *Walker*[1] hearing, the trial court determined that defendant's rights were not violated because the testimony established that he iinitiated the conversation with the reserve deputy sheriff. Assuming, without deciding, that the trial court erred in denying defendant's motion to suppress the contested statement, we hold that its admission was harmless beyond a reasonable doubt.

The erroneous admission of a confession into evidence is a nonstructural defect subject to a harmless error analysis. *People v Whitehead*, 238 Mich App 1, 6-7; 604 NW2d 737 (1999), citing *Arizona v Fulminante*, 499 US 279, 295, 306-307; 111 S Ct 1246; 113 L Ed 2d 302 (1991); see also *People v Anderson (After Remand)*, 446 Mich 392, 402-407; 521 NW2d 538 (1994). The alleged error at issue may therefore be "quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt." *Anderson*, *supra* at 405-406. "This requires the beneficiary of the error to prove, and the court to determine, beyond a reasonable doubt that there is 'no reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id.*, citing *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967). To make this determination, we examine the entire

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[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965)..

record and consider both defendant's statement and its use by the prosecutor during arguments. *Whitehead*, *supra* at 8, citing *Anderson*, *supra* at 406.

Here, defendant's statement, "Dean, it was bad. It was bad," was not a direct admission of guilt. The prosecutor referred to the statement briefly during his closing argument, informing the jurors that they had to decide what was "bad," and then again briefly in rebuttal in response to arguments attacking the reserve deputy's credibility. Moreover, other substantial evidence of defendant's guilt was properly admitted at trial, including: defendant's 1951 murder conviction which tended to establish his motive for the instant offense; defendant's familiarity with the victim who frequently visited his home; the victim's skeletal remains found on property where defendant lived at the time the victim disappeared; defendant's sudden move out of the state soon after the victim's disappearance; and, defendant's alleged admissions to his cellmate that he and the victim had an altercation, that he shot the victim twice, that he buried the body beside his barn, and that he covered it with a pile of manure which concealed the smell from the cadaver dog. The prosecution also presented testimony to rebut the evidence defendant offered in support of his theory that the victim was seen alive after defendant moved out of the state. After reviewing the contested statement within the context of the entire record we conclude that the error, if any, was harmless beyond a reasonable doubt.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Hilda R. Gage

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CLARE

File No. 98-001151-FC

People

Plaintiff

Mark Blumer/Norm Gage
Attorney for Plaintiff

John Rodney McRae
Defendant

Michael Greer/Geroge Van Kula
Attorney for Defendant

Date: 8/27/98

Action: Walker Hearing

Determination: Court denied Motion in Limine to keep out testimony of Robert Dean Heintzelman.

/s/ Kurt N. Hansen
Circuit Judge

[re-created in typewritten form]

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the Sate and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel of his defence.

Walker Hearing Transcript
dated 08/27/98, pp 4-34

THE COURT: All right. •You may proceed.

MR. GREER: Call Dean Heintzelman to the stand, Your Honor.

THE COURT: Come forward and be sworn, Please.

THE CLERK: Raise your right hand, sir.

You do solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. HEINTZELMAN: Yes.

MR. GREER: Procedurally, Your Honor, it's my understanding that Mr. Heintzelman has some information the prosecution wishes to have placed into evidence at trial. We have objected to that and are arguing that the Miranda warnings weren't being given prior to the discussion with my client, it's my understanding that the burden will be on the prosecution at this point to proceed so that technically Mr. Heintzelman would be their witness.

THE COURT: Who is going to handle it for the prosecution?

MR. BLUMER: I am, Your Honor.

THE COURT: All right. I believe that's correct, so you may proceed.

ROBERT DEAN HEINTZELMAN SR.

being first duly sworn at 10:20 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Sir, would you state your name for the Judge, please.

A Robert Dean Heintzelman, Sr.

Q Mr. Heintzelman, do you have a job that relates to the County of Clare?

A No, I don't. I'm a reserve officer.

Q You are a reserve officer?

A I'm a reserve officer.

Q For which unit?

A The Clare County Sheriff's Department.

Q And when you are acting in your reserve capacity, do you wear a Sheriff's uniform?

A Yes, I do.

Q Where do you live, sir?

A I live at 1100 South Bass Avenue, Harrison.
Q That's just south of the town of Harrison, isn't that right?

A Yes, sir.

Q In the time that you have lived in the Harrison community did you ever know anybody named John McRae?

A Yes.

Q How long ago was it that you knew him?

A Oh, probably as far back as 15 years or so. He was my neighbor.

Q He was your neighbor south of Harrison?

A Yeah. Yes.

Q And did you know him very well at that time?

A At that time, yeah, we -- I knew him fairly well, yeah.

Q And am I correct, sir, that at some point in late 1987, Mr. McRae and his family moved from this area?

A Yes, somewhere around November, I believe. Somewhere in there, yeah.

Q And did you maintain any contact with Mr. McRae during the time period that he was not living in the Harrison area after 1987?

A No.

Q Did you become aware that Mr. McRae was brought back to this community at sometime this year — or 1997?

A Yes, I was.

Q And at that time did you have any duties with the Sheriff s Department?

A I was a reserve, or still am a reserve with the Sheriff's Department, yes.

Q Any other members of your family, sir, have any association with the Sheriff's Department?

A Yes, my mother and my son.

Q What does your mother do?

A She is a reserve officer, too. She does transport. She does visitation at the jail.

Q All right. At any point in the past six months, sir, did you receive any information that would have caused you to meet with Mr. McRae?

A Well, my mother was doing visitation, I believe it was on a Sunday, and she said that Mr. McRae's wife, Barb, they were talking, and that John had told Barb to tell my mother that he would like to see me. So that's when I -- when my mother relayed the message to me.

Q All right. So you got a message from your mother that Mr. McRae would like to see you?

A Yes.

Q Was there any information in that message as to why he wanted to see you?

A No, he just said he would like to see me, and he wondered why I hadn't been up to see him. So. . .

Q When -- when you and Mr. McRae had last been neighbors, were you on a friendly basis?

A Yeah. Yeah.

Q Were you good friends?

A Yeah.

Q Did either of you share any responsibilities or farming or anything like that?

A No, my -- my children -- he was a 4-H leader for clowns and goat unit, and my children was in his unit.

Q I see. So you were friendly neighbors

A Yeah. Uh-huh.

Q Did you have any understanding or expectation as to why Mr. McRae wanted to see you earlier this year?

A No, I just -- I-hadn't seen him in years and years. I just figured maybe he wanted company. I don't know.

Q Did you know at the time you received that message that Mr. McRae was housed in the jail charged with first-degree murder?

A Yes, I did.

Q Did you take an opportunity to meet with Mr. McRae at any time?

A Yes, I did.

Q Would you explain to the Court how that came about, please?

A Well, after mother told me this, it was probably, oh, a week or so after she told me, I was -- I had done a transport, transported a prisoner, and I came in, got back in I believe it was around 11, somewhere that evening, and I told one of the COs, I said, "Well, Mr. McRae was askin' to see me. I guess-now would be a good time. If it's all right, would you take me back so I can speak -- talk with him?" So I went back and seen him.

Q Where was he when you got there?

A He was in his cell, maximum security cell.

Q And were you admitted to his cell?

A No. No, I stayed outside the cell.

Q And was Mr. McRae awake or asleep when you arrived?

A He was awake.

Q Youdid not wake him up?

A No.

Q Would you tell us what happened after you arrived at his cell, please?

A Well, first we just started talkin', talkin' about -- shook hands and everything, you know, like I hadn't seen him in a long, long time. And he asked me -- I asked him about his boy, Marty, 'cuz his boy Marty is the same age as my son. And I told him -- I told him, I said, "Well, Marty's in here from what I understand, too." And then he showed me pictures of Marty's wife and his baby, and we carried on a conversation, like you or I would.

And then I said -- I asked John -- I said, "John, did you do what you're charged with here?" And he didn't answer me. So we just went talkin' again about, well, more or less about Marty again. And I said, "Well, you know, they think Marty had something to do with that, you know, with Randy." And he says, "Well, if they try to pin it on Marty, I'll let 'em fry my ass." And that was his words.

I said, "John, did you do it?" And he just hung his head down and said, "Dean, it was bad. It was bad." That's -- we didn't discuss it any more.

Q Have you had any contact with Mr. McRae after that time?

A No, I haven't.

Q At any time -- at. any time during this encounter, did Mr. McRae say, "Wait a minute. I didn't know you were a cop. I don't want to talk to you"?

A No, I was standing there. I still had my uniform on.

Q You were in the Sheriff's uniform at the time this conversation occurred?

A Yes, sir.

Q So there was no mistaking what your responsibilities were that evening?

A No.

Q Do you have a badge as part of your uniform?

A Yes, I do.

Q And was that on your uniform?

A Yes, it was.

Q At any time did Mr. McRae suggest to you that he didn't want to discuss that topic?

A No.

MR. BLUMER: Nothing further, Your Honor.

CROSS -EXAMINATION

BY MR. GREER:

Q Mr. Heintzelman, this was at 11 o'clock or so in the evening when you went to see Mr. McRae?

A I believe so, yeah.

Q And it was at some point a week or so after you had been told that Mr. McRae wished to speak with you?

A Yeah, somewhere in there.

Q And you were standing outside the cell in your uniform?

A Yes, sir.

Q You got involved in some various family talk?

A Yeah.

Q And then you began asking him questions about the Laufer matter?

A I just asked him if he done it.

Q Well, that was asking him questions about the Laufer matter, was it not?

A Yeah.

Q Before you asked him those questions, did you give him what is commonly called the Miranda warnings?

A There was no reason to. I mean, why? Why would I? I wasn't -- it was just like if I had known you for years.

Q You didn't feel at that point in time it was necessary that you explain to him that he had a right to remain silent or that he needed -- that he had a right to have an attorney there if you were going to question him?

A No, we was talking like friends, just like I'd be talkin' to you.

Q So that was your view, that you were asking --

A Yeah.

Q -- questions about this case as a friend?

A Yeah. Yeah, as a neighbor and everything, you know.

Q After you had this discussion with John, did you then report the contents of the discussion to another police officer?

A Yes, I did.

Q And who was that Officer?

A Lieutenant McClellan

Q Did you then volunteer to go back in with a tape recorder or wire and have additional discussion with Mr. McRae?

A No, no. That was never asked to do that.

Q Well, did you volunteer to do that?

A No. No.

Q Did you suggest that you would be willing to go back and see Mr. McRae again and have further discussion concerning --

A I'd go back and talk with Mr. McRae, yes, if I was asked to, yeah. But if they would have told me to get information, he would have had to know it for sure.

Q Back to the question that I asked, did you in your discussion with Mr. Mcclellan offer to go back and talk with Mr. McRae again and get further information?

A All I said was if they want -- if Mr. McRae wanted to speak to me again, I would go back. That's what I told Mr. McClellan.

Q And did Mr. McRae ask to speak to you again?

A No.

MR. GREER: Nothing Further.

MR. BLUMER: We have nothing further, Your Honor.

THE COURT: You may step down.

Any further witnesses?

MR. GREER: Yes, Your Honor, I would call Barbara McRae.

THE COURT: Do you want to take that floor up there, please.

Raise your right hand to be sworn, please.

THE CLERK: Raise your right hand, ma'am.

You do solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MRS. McRAE: I do.

BARBARA MCRAE,

being first duly sworn at 10:27 a.m., testified on her oath as follows:

DIRECT EXAMINATION

BY MR. GREER:

Q Please state you name for the record.

A Barbara Ann McRae.

Q And you're married to John McRae?

A Yes.

Q You're acquainted with Dean Heintzelman?

A Yes.

Q You're also acquainted with Dean's mother?

A Right.

Q Did you have some contact with Dean's mother when you were up here visiting John or visiting Marty?

A Yes.

Q Did you have discussions with her about Dean visiting with John?

A Yes.

Q And why did you have those discussions?

A Because John wanted to have a friendly conversation with our neighbors.

Q At the time that you had discussion with Dean's mother, were you aware that Dean was associated with the Sheriff's Department? No.

Q The only reason was because --

A Neighbors.

Q -- you had been neighbors and friends in the past?

A Yes.

MR GREER: Nothing further, Your Honor.

MR. BLUMER: No questions, Your Honor.

THE COURT: You may step down.

MR. GREER: Call Kerry Kocsis to the stand, Your Honor.

Kerry,-.would you come forward to the stand, please, as soon as they're ready for you.

THE COURT: Raise your right hand and be sworn, please.

THE CLERK: You do solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. KOCSIS: I do.

KERRY KOCSIS,

being first duly sworn at 10:30 a.m., testified on his oath as follows:

DIRECT EXAMINATION

MR. GREER:

Q Please state your name for the record.

A Kerry Kocsis.

Q Are you acquainted with John McRae?

A Yes, I am.

Q Had you been a cell mate of John's?

A Yeah, for six months.

Q Were you present at the time when Dean Heintzelman come back and talked with John?

A Yeah, I was.

Q And approximately when did that Occur?

A Just about midnight.

Q Where was John at at the time when Dean came back?

A He was sleepin'.

Q What happened at that point in time?

A I was sittin' between my cell and John's cell watchin' TV, and Officer Dean come in and walked down to the end of the cell and called John's name. John woke up, got put his glasses on, and came out and stood by the bars, waited by the bars to talk to him.

Q Were you within earshot?

A I was from me to this officer standing to my right here, about that close.

Q So you were able to overhear the whole discussion between John and Dean?

A Yes, I was.

Q Approximately how long did the discussion take place?

A He wasn't in there more than ten minutes.

Q During the discussion, did you hear --

THE COURT: What did you hear? In reference to what.

MR. GREER: Thank you, Your Honor.

BY MR. GREER:

Q While you were overhearing the discussion, did you overhear a discussion between Dean and John concerning Randy Laufer?

A No, he -- they talked about their -- they talked about John's son, and then they talked about John's son's kids. And they talked about how John was doin' in the jail. And he did ask -- I did hear him ask John if he done it. And John didn't say nothin'. And a few minutes after that, he was -- John went back to his cell and Officer Dean started walkin' away. And Officer Dean told John, if he had anything to tell him later, or if he wanted to talk to him later, that he knew how to get ahold of him. And he left.

Q So your testimony is that you did hear Dean ask John if -- concerning Randy Laufer, if John done it?

A No, all -- I didn't know who he was talkin' about. I believe I heard him say, "Did you do it?"

Q Without anything more specific?

A No.

Q Concerning that.

And what response did John make?

A He didn't. He said, "No," and turned around and walked back into his cell.

Q And you were there listening then until Dean left?

A Yes, I was sittin' on my bucket watchin' TV.

Q Was there ever any other time that you were present that Dean Heintzelman came in the evening and talked with John?

A No, he never come back after that.

MR. GREER: No further questions.

CROSS-EXAMINATION

BY MR. BLUMER:

Q Which was it, Mr. Kocsis? Did he not say anything, or did he say no?

A He said no.

Q You're sure now?

A Positive.

Q Because the first time you answered that question, you said he didn't say anything, right?

A No. I said he said no.

Q Okay. You're surrounded by prison guards, sir. What are you in for?

A Pardon?

Q What were you convicted of?

A Murder.

Q While you were waiting for trial, you shared a cell with Mr. McRae?

A We was in the same unit.

Q You said you were cell mates. You didn't share a cell?

A No.

Q You were in the same wing of the jail, or the same unit?

A Yeah.

Q And you were there with him for about six months, is that right?

A Yeah.

Q Did you get to be -friends while you were in jail with him?

A Acquaintances.

Q Both staring at the same charge, weren't you?

A Ah, yeah, I believe so. I believe that's what he's charged with, open murder.

Q Do you feel any kinship for McRae because you were both in the same jail cell wing together and you were both facing the same serious charge?

A No.

Q None at all?

A No.

Q Do you know how it is the defense attorneys came to know that you had information about this?

A Pardon?

Q How is it that the defense attorneys came to know that you were a possible witness on this issue?

A I believe Mr. McRae said somethin'.

MR. BLUMER: Nothing further. Thank you.

MR. GREER: No further questions of this witness, Your Honor.

THE COURT: You may step down.

MR. GREER: As far as we're concerned, Your Honor, he may be excused. If there is no particular reason the prosecution wants him, he can be transported back.

MR. BLUMER: We have no objections to releasing him, Your Honor.

THE COURT: All right. He is released from his subpoena, and you may take him back.

MR. GREER: I'd call John McRae to the stand, Your Honor.

THE CLERK: Raise your right hand, sir.

You do solenuily swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. McRAE: Yes, ma'am. I do.

JOHN RODNEY McRAE,

being first duly sworn at 10:35 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR GREER:

Q Please state your name.

A John Rodney McRae.

Q And you're acquainted with Dean Heintzelman?

A Pardon?

Q You're acquainted with Dean Heintzelman?

A Yes, sir.

Q You have been in court here and heard Dean talk about coming to visit you?

A Yes, sir.

Q Did Dean come visit you in jail?

A Yes, he did.

Q Had you previously made a request that Dean visit you in jail?

A Not exactly.

Q Had -- how was it, as far as you were aware, that Dean came to visit you?

A When my son was there, Dean and his son both came up to visit him, talked with him on numerous occasions. Uh, my wife told me that Dean's mother was working on the desk, or whatever it is when they have visits, and she had kept telling her that Dean would be up to see me. And I guess it was some point in time Barbara may have asked her when Dean was going to do this. I'm not exactly certain as to what transpired there.

MR. BLUMER: Your Honor, I'm going to object to this as hearsay.

THE COURT: Sustained.

BY MR. GREER.

Q Were you aware that Dean was an employee or associated with the Sheriff's Department?

A No, sir, I was not.

Q Do you recall the evening when Dean came to visit you.

A Yes, I do.

Q Approximately what time was it?

A It was five minutes after one on a Tuesday morning.

Q How are you so certain of the time?

A Because we had the -- it was Monday night football. We had stayed up and watched the '49ers, which went real late, and I had gone to sleep. The TV is usually turned -- in the evening, we turn it to the local station, has the clock on the bottom. You know, used to have the clock, and the date, and the time on the bottom of the screen on the Channel 2 on the cable.

Q Were you awake or asleep then?

A I was sound asleep.

Q What occurred, that you recall, when Dean came to your cell?

A I heard someone calling my name two or three times, and I looked up and I saw Dean standing there. I recognized him. And I got up, and I have my glasses. I also have dentures, which I had to sort of get myself together to talk. And I went out there to say hello, and that's basically what I did.

Q What sort of a conversation did you and Dean have?

A Well, the first thing he said was, "John, John, now did you do it? Didn't you do it? Do you remember what happened? Did you forget it?" Several little statements like that, one right after the other. And I told him that -- and I wasn't talking very loudly -- if I could just deviate

for a minute from this, that there was a person laying on the floor who I had to lean over to get to the bars. He kept calling me to come next to the bars in the corner. There was an inmate that they had just brought in laying there. His eyes were wide open, he was looking right at me. I was trying to be very cautious as to what I said. And I just shook my head, and I said, "No, not anything at all like they're trying to make it out to be." And that basically was the end of that. Then we went on and talked about my family and his family, and kids and so on, like that.

He ended up with when he left, he said, "Well, if you ever decide you want to get something off your chest, call me, and I'll come and get you." Now, basically, that was the extent of what was said.

Q At the point in time that you were in the cell, was there an attorney appointed to represent you?

A You.

Q I had been appointed already at that point in time?

A Yes, sir.

Q And Previously, when you had been questioned by the police, you indicated that you didn't wish to answer their questions, you wished to consult with an attorney?

A I can't hear you, Mr. Greer.

Q Previously, when you had been questioned by the police, had you indicated that you wished to remain silent and not answer questions?

A Yes, sir.

Q Did you ever communicate to the Sheriff's Department that you had changed your mind, that you now wanted to talk about the matters that brought you here?

A No, sir, I never have.

MR. GREER: No further questions.

MR. BLUMER: No questions, Your Honor.

THE COURT: You may step down.

MR. GREER: We have no other witnesses to present, Your Honor.

THE COURT: Any further witnesses?

MR. BLUMER: The People have no further witnesses.

THE COURT: Are you prepared with argument on this?

MR. BLUMER: Yes, Your Honor.

Your Honor, Mr. McRae's testimony goes to the weight of the testimony. He's created an issue of credibility. What this Court has to decide at this hearing is whether or not the statement is admissible in the first place, and I believe that it is, if for no other reason than the testimony of Mrs. McRae. She acknowledged what Dean Heintzelman testified to, and that is that she passed along a message that her husband would like to talk to his

old friend. He needed some old people -- some old friends to come visit him in his cell. He was lonely. That's the reason Mr. Heintzelman went to visit in that jail cell.

Now, I think it's of interest to the Court in considering this issue that the message was passed through Mr. Heintzelman's mother, who was also a jail house employee. The fact is that it doesn't matter that Dean Heintzelman was an employee of the Sheriff's Department under the circumstances. He -- there was no question that he was when he got there. He was wearing his badge and his uniform. It's not like it was some kind of a secret. Furthermore, if Mr. Heintzelman were simply a farmer in this community and under the exact same circumstances went and visited Mr. McRae and Mr. McRae made the exact same statement to him, then the statement would be equally admissible. The only question here is did Mr. McRae actually invite him to visit him in his cell and talk about it, and that's exactly what happened.

You have the testimony from Mr. Heintzelman that he wouldn't have gone there if he hadn't been invited. He went there and he had a casual conversation with him, and in the normal course of the casual conversation between old neighbors, he said, "Did you do what they say you did?" And he got both a verbal and a physical response.

Now as to the credibility issue that we see here, first of all, I don't think the Court has to address it; but if you do, I find it interesting that Mr. Kocsis claims he was in a position where he could hear and observe everything that was going on, and his description was rather different than Mr. McRae's description.

THE COURT: Well, the purported statement that you want in is in response to the question, "Did you do it," or something to that effect?

MR. BLUMER: He hung his head down and said, "Dean, it was bad."

THE COURT: "It was bad," that's what you want?

MR. BLUMER: His physical behavior -- his description of his physical behavior and his statement, "Dean, it was bad."

Your Honor, this was an invited conversation. There was no question that Mr. McRae was confronting a law enforcement officer when he had the conversation. He was in open uniform. And he made the statement. If Defendant wants to contradict the statement, then it becomes a matter of credibility for the jury to consider. But that doesn't change the fact that this was a freely made, invited conversation.

MR. GREER: Your Honor, we're not really prepared to argue the legal issues at this point. The request that we have made in the brief had been that there be an evidentiary hearing, which we've had in this matter.

To respond partially, though, to what Mr. Blumer says, he's correct regarding the credibility issue, and I recognize that that's not a matter that the Court decides today. However, our basic position is that a Sixth Amendment waiver, you know, once a person has indicated a desire to have counsel represent them in further contacts with the police has to be unequivocally

given by contacting the police, saying "I'm ready to talk. Have somebody come see me." That wasn't what took place here. There's very little question that Mr. Heintzelman --

THE COURT: Well, the issue in this case is whether or not they could proceed to go ahead and talk to him or whether or not they had to advise him of his so-called Miranda rights.

MR. GREER: And our Position is that they had to, Your Honor. That there had not been a clear, unequivocal waiver of the right to have counsel present at any further contact with the police agency, and that's what took place in this matter. The Police agency --

THE COURT: Well, do you have any law for the Court?

MR. GREER: I don't, Your Honor. That's why I indicated that we weren't prepared to go forward on the legal arguments at this point. The request had been that we have an evidentiary hearing. That was agreed to by the prosecution. The briefs that we filed indicated that pending the evidence coming forward at the evidentiary hearing, that at that point we would be prepared to prepare legal arguments to the Court. I guess that's, you know, my request at this point.

THE COURT: Well, when are you going to be ready to present argument on it?

MR. GREER: My co-counselor would like to address the Court briefly, Your Honor.

MR. VAN KULA: If the Court would, Your Honor, in our brief in support of the motion in limine to exclude the testimony of Mr. Heintzelman we do make reference to People versus Cheatham in support of our Fifth Amendment claim. Michigan versus Jackson, People versus Crusoe in terms of the Sixth Amendment defense.

I would suggest merely in passing to the Court, People versus Crusoe, where an attempt is made to deliberately elicit from the accused without the presence or waiver of counsel, then it's admissible. Whatever may or may not have happened in regard to an invitation, but let's assume hypothetically for the sake of discussion that there was an invitation of some sort, Mr. Heintzelman by his own admission, deliberately attempted to elicit incriminating evidence, "Did you do it?" I can't imagine more incriminating effort than that made by Mr. Heintzelman.

And under the cases cited in our brief in support of the motion to exclude the testimony, I think there is perhaps sufficient legal basis, although if the Court wishes, we could supplement based upon the testimony. But I would propose that at least at this stage there is that authority in the Court's file. Thank you.

MR. BLUMER: May I, Your Honor?

THE COURT: I'm not sure where we're going with this. You know, frankly, I'm somewhat disturbed. I mean, listen, you ask for a Walker hearing. The issue is whether or not Miranda rights had to be given under the circumstances. The question is whether or not the Defendant was the one who invited the conversation. If he

invited the conversation, then there's no necessity to advise him of Miranda rights. And so now here we have a situation where you're saying, well, he invited the conversation for social purposes, and then the police officer involved, the reserve officer, at that point in time, asked certain questions. Now, either you have some law saying that what was done was improper, or you don't, I guess. I mean, you knew that this is what the testimony was going to be ahead of time. So, I mean, you know, are we ready on this, or are we not? Do you just want me to assign general principles of law that you have already cited and resolve the issue?

MR. BLUMER: Your Honor, I didn't understand that we wouldn't resolve this issue today. We're just a couple weeks away from the trial date on this matter. I don't know how far off we can put all this stuff. My understanding is the trial date is September 9th in this matter.

The fact of the matter is that I'm not aware of any law that says that Miranda warnings have to be given after he initiates -- remember, under the facts that have been produced in court, he asked for a specific person to come visit him in the jail cell. That person just happened to have a job in the Sheriff's Department, but he invited that person for a conversation. That's a waiver of any -- I defy the Defendant to produce a case that says when the Defendant initiates the conversation and invites a particular person into his jail cell, and that's the evidence that stands before this Court, that subsequent warnings have to be given, especially when that person is in a blatantly obvious Sheriff's uniform. That there was no effort at deceiving the Defendant into making a statement here, which is one of the cases cited by the defense.

THE COURT: Do you have any law to indicate that once the Defendant initiates the conversation, that a police officer cannot ask questions then concerning the guilt or innocence of the individual? And is not the initiation of the conversation a waiver of any Miranda rights?

MR. GREER: Your Honor, the initiation of the conversation, the testimony the Court has heard, basically we have two situations. One is testimony actually which goes both ways, whether my client actually initiated the contact to have Dean come, wife had been the one that made the statements that John wanted to see Dean. That was as a private individual. It was not an unequivocal situation where we have a person knowing that a police officer is out there and they wish to speak to that individual as a police officer. John had no knowledge. Mrs. McRae had no knowledge that Dean was a police officer. My client is asleep; is, you know, awoken at one o'clock in the morning by an individual that he is acquainted with as a police and sees that he is dressed as a police officer. That, to me, is a contact initiated, especially at that point in time, you know, by the agency of the police for purposes of, you know, interrogation basically.

The discussion of family niceties and things like that I think is a pretty clear tactic that is often used in investigation interview by detectives attempting to get information. There had been no waiver of right to counsel or necessity of having Miranda given when Mr. Heintzelman appeared to talk to my client.

THE COURT: Well, you aren't seriously contending that the Defendant didn't initiate the desire to

talk to Mr. Heintzelman are you? I mean, you presented testimony yourself from his wife saying that, yes, this occurred.

MR. GREER: Oh, I'm indicating that's why Mr. Heintzelman says he showed -- that's -- we're not questioning that's what Mrs. McRae said. You know, it was somewhat equivocable from John whether, you know, he had requested Dean come in or had been curious why he hadn't been there. So for purposes of the argument, he was seeking to have social contact with someone that had been an acquaintance and neighbor, you know, ten, 15 years prior.

THE COURT: Well, the issue for the Court, as far as the Court is concerned, is why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at that point in time, or was he back there at the request of the Defendant, and it seems pretty evident to the fact that he was back there at the request of the Defendant. He wanted to talk to him. The Defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the Police officer had to do.

Once the conversation is initiated by the Defendant, there's no necessity to advise him of any rights concerning the Miranda rules. So absent you being able to come up with some kind of law to the contrary, the Court's going to deny the motion in this situation to -- in limine to keep out the testimony of Mr. Heintzelman.

What matter did you want to take up next?

Let me ask you this. Okay, we have the motion f or change of venue in this particular situation. What's the parties' position on that?

MR. BLUMER: Your Honor, the Defendant has made a motion, backed up by exhibits, as to community publicity. Frankly, the People take no position with respect to that. We would leave it to the discretion of the Court, except that I'm somewhat concerned with the prevailing case law that says you have to try first before you determine that there's no jury available in the community. But beyond that, and I'm sure the Court is perfectly aware of that state of the law, we take no position with respect to the merits of changing venue.

THE COURT: Well, the real question involved is because of the pre-trial publicity and that type of thing, whether or not the parties feel that it's going to be fruitless to go through the exercise of attempting to seat a jury. And obviously, there's been extensive coverage, both at the time of the alleged incident, and also at the time of the arrest of the Defendant. And so it's virtually a regurgitation of everything that had occurred prior to this time, all the same pictures from back in 1987, and all kinds of statements were being

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You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

HERIFF GOYT: I do.

SHERIFF JEFFERY GOYT,

being first duly sworn at 9:30 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GAGE:

Q Good morning, sir.

Would you state your full name for the record, spell your last name.

A Jeffery Goyt, G-o-y-t.

Q Where are you employed, sir?

A The County of Clare.

Q And what's your position with the County of Clare?

A Presently I'm the sheriff for Clare County.

Q How long have you been the Clare County Sheriff?

A I have been Clare County Sheriff for two years out of a total 28 years I have been employed by the County of Clare.

Q And during the time you have been employed by the County of Clare, has that been continuous with the Sheriff's Department?

A That's correct.

Q Were you employed by the Clare County Sheriff's Department in September of 1987?

A Yes, I was.

Q What was your position with the Sheriff's Department in 1987, sir?

A I was detective lieutenant in charge of the Detective Bureau.

Q And as the individual in charge of the Detective Bureau, sir, what would be the responsibilities that go with that position?

A I overseen a staff at that time of two detectives, and also the caseload as it came in and it went out of the Detective Bureau.

Q And, sir, in September of 1987, if you recall, were you involved in an investigation of a missing youngster named Randy Laufer?

A Yes, I was.

Q And that was in your role as a department head for the Detective Bureau?

A That's correct.

Q Are you familiar with John McRae as a result of that investigation, sir?

A Yes, I am.

Q And, sir, are you able, as a result of working on the investigation, can you say where John McRae lived in 1987?

A In 1987 he lived on Monroe Road in Hatton Township, Clare County. When we first became aware of Mr. McRae living there, he had moved, and he had moved to Mesa, Arizona.

Q And, sir, do you know when Mr. McRae moved to the Arizona area?

A Sometime in the fall of 1987.

Q Sir, 1m going to show you a picture that is marked as People's Proposed Exhibit No. 2. Get over here where you can see it. Can you see that all right?

A Yes, sir.

Q And are you familiar with this Picture?

A Yes, I am.

Q And what does this picture represent, sir?

A This depicts the 1997 Photograph of what was where Mr. McRae lived in Hatton Township, Clare County, at the time the body was discovered.

Q And, sir, just so that the record is straight, do you recall when the body was discovered?

A I believe it was August of '97.

Q And, sir, are you familiar with where this is located at, where this picture would have been taken at?

A Of the geographical area?

Q Yes, sir.

A That's on Monroe Road, south side of Monroe Road, again in Hatton Township, Clare County, between Bass Lake Road and Harrison Avenue.

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Q And can you recognize this picture?

A Yes, I do.

Q And what is this picture a depiction of, sir?

A This is a depiction of the same area as depicted in the other piece of evidence, but it was taken, again, in the spring of '88. It depicts the McRae homestead located on Monroe Road.

Q And, sir, is this an accurate portrayal of the picture that you took?

A Yes, it is.

MR. GAGE: Your Honor, we would move for the admission of People's Exhibit 1.

MR. GREER: No objection.

THE COURT: People's 1 is admitted.

BY MR. GAGE:

Q Sheriff, in comparing these two pictures -- strike that.

MR. GAGE: I have no further questions, Your Honor.

THE COURT: Mr. Greer.

CROSS-EXAMINATION

BY MR. GREER:

Q Good morning, Mr. Goyt.

A Good morning.

Q Were you involved in taking the original report regarding Randy in September of 1987?

A Police reports?

Q Correct.

A Yes, I contributed to that report.

Q And after his parents reported that he was missing, your agency followed up and talked with individuals at the school, and teachers, other friends of his, things like, that, didn't you?

A Yes.

Q And based on what the Laufers had told you, as well as the information you received at the school, you treated Randy as being a runaway at that point, did you not?

A Yes.

Q You continued involved in this case through the spring and summer of 1988, did you not?

A Continually for ten years.

Q More specifically, though, Spring and summer of 1988 you were involved in the case?

A Yes.

Q In the spring of 1988, were you in the company of Glenn Artress and did a search of the McRae property?

A Yes.

Q Do you recognize the name Glenn Artress?

A Yes.

Q What is Glenn Artress, or who is Glenn Artress?

A At that time Glenn Artress was a sergeant for the Otsego County Sheriff's Department. He was a dog handler. He specifically handled a dog known as a cadaver dog, which was used to aid in detecting deceased persons that had been buried.

Q And did you do the search of the McRae property sometime in the spring of 1988?

A Yes.

Q In his company?

A Yes.

Q Did you do a thorough search of that property?

A Over that period of time, along with Sergeant Artress and other cadaver dogs from other agencies, we searched

several pieces of property, including the McRae homestead.

Q Did you also do a search of the McRae homestead with some other cadaver dog handlers in the summer of 1988?

A I don't recall the year. I believe it was '88. But yes, with two other dogs other than Glenn Artress's dog.

Q And that would be with John Skalski would be one of those dog handlers?

A Yes from the Detroit Police Department.

Q And Linda, whose name I can't pronounce, being the other dog handler?

A I remember her name is Linda, and I don't recall her last name, and she was a dog handler from Wayne County Sheriff's Department.

Q She also participated in searching the McRae property?

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your last name for the record?

A Victoria Hudson, H-u-d-s-o-n.

Q Ma'am, where do you live?

A 1908 Monroe, Harrison.

Q Is that in Clare County?

A Yes, it is.

Q And how long have you lived there?

A Seventeen years.

Q And does anyone live with you?

A My family.

Q Okay. And were you living in the same location in 1987?

A Yes, sir.

Q Where you live, are you on a lot, or is it a rural setting? Can you describe the setting, please?

A I have got a small farm there. I have about -- right now I have about 18 acres.

Q Okay. And are you familiar with an individual named John McRae?

A Yes, sir.

Q And how is it you're familiar with John McRae?

A He lived next door in '87, back a few years ago.

Q Do you see Mr. McRae in the courtroom today?

A Yes, sir.

Q Would you point him out to the Court and tell the Court what he is wearing?

A He is wearing a suit, blue, I assume, with a tie.

MR. GAGE: Your Honor, may the record reflect she has pointed to the individual sitting next to Mr. Greer at the counsel table?

THE COURT: It may so indicate.

MR. GAGE: Thank you, Your Honor.

BY MR. GAGE:

Q Did there come a point in time when the McRaes moved?

A Yes, sir.

Q And do you recall when they moved?

A I don't know a date, but they moved in the middle of the night.

Q And do you remember the year that they moved?

A No, sir.

Q I'm going to show you, if you would direct your attention to this photograph here that's marked as People's Exhibit 1. Do you recognize that photograph?

A Yes, sir.

Q And can you tell the Court what that photograph is?

A It is where the McRaes lived next to my farm.

Q Okay. And what are the buildings located in that portrait, if you know?

A Well, the trailer house is where they actually lived. The cabin was used maybe for storage. It was not livable. And the barn is where they kept animals.

Q What kind of animals did the McRaes keep there?

A Goats, mostly. I believe they might have had a sheep at one time, but goats is what I can remember.

Q Did they have very many goats, if you recall?

A Quite a few.

Q Now, you talked about the family moved in the middle of the night type thing. What is it about the way they moved, if anything, that you found unusual?

A Well, I woke up in the morning, and their dog was tied to a tree in my yard.

Q And did you try to return the dog?

A Well, I went down there. There was no one there, but I assumed if it was tied in my yard, that there was a reason for it.

Q And do you recall back when Randy Laufer came up missing?

A Yes, I do.

Q And how is it you remember that?

A Well, there was quite a few things going on. There was posters in the business that I worked at, and there was a search. The Sheriff's Department was searching, Howard Haskin on horses, and everybody was looking.

Q And do you recall whether or not the McRae family had moved yet at this point in time?

A No.

Q You don't recall?

A Oh, I do recall, yes, they hadn't. They were still there.

Q After the McRaes moved, what happened to their property, if you recall?

A Well, I had bought the surrounding property from a gentleman and bought it on a tax sale. It sat empty for a couple of years, and my dad worked at Jerry Brandt's Realty, and I had him inquire because I wanted to add it to the property because it all adjoined mine. And he bought

it -- he got ahold of the gentleman that owned it, and we bought it from him.

Q Now, during the time from when the McRae family moved out and when you purchased the property, do you recall anybody moving in to that property and living in the trailer?

A Not at all.

Q Do you recall when you purchased the property?

A It was two to three years after they had -- they had moved out. Possibly even four years.

Q Now, when you purchased the property, were these structures still located on the property that is shown in this picture?

A Yes, sir.

Q And what happened to the different structures that were there?

A Well, I inquired at the Sheriff's Department and asked them if they were done, you know, investigating and such, and they said that they were, that I could do what I wanted. So I had my brother tear the cabin down. I had a gentleman, I don't recall his name, that lived on Timberlane, haul the trailer and stuff. And it was just trashed. It wasn't usable for anything. And he also tore the barn down.

Q What do you use this land for now?

A I use it for pasture.

Q Now, is this land fenced in, or is it open so's anybody can get in?

A No, it's fenced.

Q About how long has it been fenced?

A About three years.

Q Do you have any employees that work for you?

A Yes, sir.

Q How many employees do you have?

A I have just the one for the farm, Clinton Goodenow.

Q And how long has Clinton worked for you?

A Close to seven years.

Q Do you remember a point last year when you sent Clinton out in that pasture to do some work?

A Yes, sir.

Q And when approximately was that?

A Gosh, the day I don't remember. I remember it was raining.

Q Do you remember what part of the year it was; spring, summer, whatever?

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THE WITNESS: C-l-i-n-t-o-n, G-o-o-d-e-n-o-w.

BY MR. GAGE:

Q Thank you, sir. Try and relax.

Sir, are you employed in the Harrison area?

A Yes, I am.

Q And where is it you're employed?

A For Vicky Hudson.

Q And what do you do for Ms. Hudson?

A I tend to the horses and that. I work on the farm.

Q And how long have you been doing this, sir?

A About seven years.

Q And where is Ms. Hudson's farm located at that you work?

A On Bass Lake and Monroe.

Q And that's in Clare County?

A Yeah.

Q And were you working for Ms. Hudson in the fall of 1997?

A Yes.

Q And as part of your duties, do you operate heavy machinery f or Ms. Hudson?

A Yes, I do.

Q What type of machinery do you operate?

A Farm machinery and sometimes backhoe.

Q Did there come a point in time last summer that Ms. Hudson had you doing some work with the backhoe out in the pasture?

A Yes.

W And what was the nature of the work that Ms. Hudson wanted you to do?

A Burying a foundation that the horses kept on getting hurt on.

Q Sir, I'm going to direct your attention to a picture over here on this wall. Do you recognize that picture?

A Yes, I do.

Q And how is it that you recognize that pitcture?

A It's the area where I found the body.

0 Okay. Now, that's not what the property looked like when you found the body, is it?

A No.

Q Sir, if you would step over this way and point out to the jury -- don't speak -- just step over and point out to the jury in that picture the area where you were doing the digging.

MR. GREER: Your Honor, I'd ask that he set a time frame. If he's talking about the digging that was done in 1997, this photo bears no relevance to that.

MR. GAGE: I think, Your Honor, he can point out the area on that picture and then narrow it down with the 1997 picture.

THE COURT: Well, the question is when did he do the digging that you're referring to.

MR. GAGE: I asked him the question prior to that, the summer of 1997, if he did some digging.

THE COURT: Okay. So that's what you're referring to?

MR. GAGE: Yes, Your Honor.

THE COURT: Okay. Objection overruled.

BY MR. GAGE:

Q It would be along that building there?

A Yes.

Q Please come back and have a seat, sir.

Sir, I'm going to show you another picture that's marked as People's Exhibit 2. Can I set it here?

Do you recognize this photograph, sir?

A Yes, I do.

Q And what is that a photograph of?

A That's a photograph of Vicky Hudson's farm and the area where I done the digging.

Q And, sir, if you would step up to this picture here and point out to the jury the area that you were doing the digging at, if you recall.

THE COURT: Can you see that, Mr. Bechtel?

JUROR BECHTEL: No.

THE COURT: Why don't you take that easel, why don't you set it over by the corner of the jury box, and then everybody is going to be able to see what we're looking at.

BY MR. GAGE:

Q Mr. Goodenow, do you recognize that picture?

A Yes, I do.

Q And I'm sorry. If you would tell the Court what that picture represents?

A That represents Vicky Hudson's farm and also the area where I was digging.

Q And does that represent the area where were you digging at the time that you were doing the digging?

A Yes.

Q And, sir, if you could, in this picture could you just step down and point out to the Court the area that you were doing the digging in, in that picture?

A Yes.

Q Please do, sir.

A Right about here.

Q Thank you, sir.

Q May the court record show that you Pointed to an area just in front of an individual tree where there's a bare opening?

A Yes.

Q Sir, do you remember approximately what time it was you started digging in that area?

A It was late afternoon.

Q And approximately how long were you digging, sir?

A About an hour, an hour and a half, somewhere in there.

Q If you recall, sir, how big a hole was it that you dug?

A It was eight by six by eight feet deep.

Q Now, did you measure that, or is that an approximation?

A That's an approximation

Q And during the time that you were digging this hole, did you notice anything unusual while you were working?

A Not until the end of that.

Q What do you mean "not until the end of that"?

A Not until I got done filling the hole in. And the one pile of dirt that I had left over, it is when I found a skull and some other bones to the body.

Q Now, when you're talking about a pile of dirt, where did this pile of dirt come from?

A From that hole.

Q From when you dug the hole?

A Yes.

Q Okay. And, sir, how is it that your attention was drawn to these bones?

A I just happened to look down and seen the skull laying there.

Q Where was the skull laying in regards to where you were at?

A Um, just outside the window of the backhoe.

Q And were you able to see this clearly?

A Yes.

Q What was the lighting like?

A It was pretty near dark.

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MR. BLUMER: People call Lieutenant Mark McClellan.

CLERK GREEN: Raise your right hand, please.

You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

LIEUTENANT McCLELLAN: I do.

LIEUTENANT MARK MCCLELLAN,

being first duly sworn at 10:18 p.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good morning, sir.

A Good morning.

Q Would you state your name for the jury and spell your last name, please?

A Mark McClellan, M-c-C-l-e-l-l-a-n

Q Mr. McClellan, how are you employed?

A I'm a detective lieutenant with the Sheriff's office in Clare County.

Q How long have you been involved in law enforcement, sir?

A I have been in law enforcement for 24 years.

Q And how much of that have you been a detective?

A I have been a detective for the last two years.

Q With the Sheriff's Department?

A Yes, sir.

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situation?

A Yes, I did.

Q Okay. You were the detective lieutenant in charge of the investigation?

A Yes, I was.

Q What was your next step as the command officer there, sir?

A At that time, I secured the scene. Sheriff Jeff Goyt was en route. He had also been notified. After I had first observed the skeleton and two other bones, we proceeded back out to my patrol vehicle. I secured the area. And then numerous other officials were contacted.

Q All right. Did anything happen to alter the scene that night?

A The only thing that altered the scene was that I personally picked up the skull and the two bones after they were marked and photographed at their location, due to the fact that there are wild animals running in the area and I didn't want those disturbed during the evening hours.

Q What happened after that, sir?

A After I seized the property, the entire area was secured off with yellow tape. I called in Detective Sergeant Conway

and Deputy John Wilson. The scene was turned over to them before I left to secure the scene for the entire evening.

Q Did you give them specific instructions when you left that evening?

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A I took those x-rays, along with the evidence, down to Dr. Simson on Friday, August 22nd.

Q At some point after that, did you return to the scene to continue to examine that scene with additional expert people?

A Yes, I did.

Q When was that, sir?

A August 26, 1997.

Q And what was the purpose of that revisiting of the scene?

A We went back out to the scene with some more Michigan State Police personnel, Dr. Norm Sauer, and another --

Q Was Dr. William Lovis there?

A What's that?

Q Dr. William Lovis, was he there?

A Yes, Dr. William Lovis.

Q And to your knowledge and observation was additional excavation and examination of the scene done?

A Yes, we did more excavation of the scene and more photographs were taken.

Q And do you know if any other additional bones were found at that time?

A Yes, there were several other bones found at that time.

Q Is it correct, sir, that you have been the officer in charge for the Clare County Sheriffs Department for your entire involvement in this case?

A Yes, I have.

Q And let me ask you, sir, have you been aware of information produced in the media concerning this case locally within the Clare County area?

A Yes, I have,

Q To your knowledge of the Police report and the contents of the report, and in your mind as the detective in charge of this case, up until, let's say, three to four months prior to today's date, was there ever any consideration of the use of a firearm in this case?

A No, there was not.

Q Did you have any specific knowledge as to how Randy Laufer might have died and ended up in that hole?

A Not until after the autopsy was done and the examination by the specialists no.

Q Okay. But even up until the last three or four months, you had no suspicion that a firearm might have been involved in this case?

A Not whatsoever

Q Was there any mention in any Police reports that you have been charged with, or in charge of caring for, or creating, that a firearm may have been involved in this case prior to three or four months ago?

A No, there was not.

Q Okay. Are you aware of any reports in any press prior to – well, even prior to today, that mention the possibility of the use of a firearm in this case?

A No,

Q At the time that Randy Laufer's body was located on Property owned by Victoria Hudson, do you know where Mr. McRae was located?

A I knew he was located in Arizona. As far as a town, I had no idea.

Q Did you make efforts after the Randy -- after Randy Laufer's body was located, did you make efforts to determine where you could find Mr. McRae?

A Yes, we did.

Q Ultimately were you involved in the arrest of Mr. McRae?

A Yes, I was.

Q And was that in the city of Mesa, Arizona?

A Yes, it was.

Q And were you responsible for bringing Mr. McRae back to the state of Michigan to stand trial?

A Yes, I was.

Excuse me, Your Honor.

MR. BLUMER: Excuse me, Your Honor.
Your Honor, we have no further questions. Thank you.

THE COURT: Cross~exam?

MR. GREER: Thank you, Your Honor.

CROSS ~EXAMINATION

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Q Does it indicate when they were at the Scene?

A Deputy Michael Coon arrived at 12 noon, Dean Heintzelman is logged in arriving at 4:00 p.m., and there's no time for Mike Heintzelman.

Q Now, were you at the scene when those individuals were at the scene?

A Yes, I was.

Q And while you were at the scene, with the excavation going on, was there a fair amount of discussion going on concerning what may have transpired at that scene prior to the bones being found? Was there discussion about Randy Laufer?

A Yeah, there was a discussion about Randy Laufer, possibly being the bones of him, yes.

Q Was there any discussion about John McRae?

A Not that I recall at that time, no.

Q The Exhibit No. 6 that's got the sock in it marked "right," had you been the individual that put "right"?

A No, sir.

Q So do you have any idea who it was that made a determination that that was a right sock or a right foot?

A Yes, sir, those were determined down in Lansing by Dr. Norm Sauer. When he examined the bones in the cocks, he was able to determine what was right and what was left.

Q So some of the information that's on the bag then in the evidence was riot put on by you?

A Not by me, no, sir.

MR. GREER: Nothing further.

THE COURT: Any redirect?

MR. BLUMER: No further questions, Your Honor. Thank you.

THE COURT: You may step down.

Call your next witness.

MR. BLUMER: Your Honor, the People call Mr. Robert Laufer.

CLERK GREEN: Raise your right hand and be sworn, please, sir.

You do solemnly swear that the testimony that you are about to give is the truth, the whole truth, arid nothing but the truth, so help you God?

MR. LAUFER: I do.

CLERK GREEN: Would you have a seat in the witness chair.

ROBERT LAUFER,

being first duly sworn at 10:47 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good morning, sir.

A Good morning.

Q Now, Mr. Laufer, I'm going to ask you to speak clearly and loud so that everybody in the jury can hear you, sir.

Would you tell us your name, please.

A Robert Laufer.

Q Spell your last name.

A L-a-u-f-e-r.

Q Where do you live, sir?

A Harrison.

Q How long have you lived there?

A Since early '80s.

Q Were you living there with your family in 1987?

A Yes, sir.

Q In 1987, who was in your family, sir?

A Me, my wife, my daughter, and my son.

O And who was your son?

A Randy.

Q Let me show you a photograph which has been marked with the People's Exhibit No. 3 tag on it. Can you tell us if you recognize this photograph?

A Yes, sir.

Q Who is it?

A That's Randy.

Q How old was he when this Photograph was taken?

A Fourteen.

Q And at some point is it correct, sir, in the summer of 1987 Randy disappeared?

A Yes.

Q Was this picture -- does this picture look like him at about the time he disappeared?

A Yes, pretty close.

Q Was this taken for school? It looks like a school photograph?

A It is a school photo.

Q Is this an accurate picture of your son at about the time he disappeared?

A Yes.

MR. BLUMER: Your Honor, we move the admission of People's Exhibit 3.

MR. GREER: No objection, Your Honor.

THE COURT: Three is admitted.

BY MR. BLUMER:

Q In the summer of 1987, how old was your boy?

A He would have been 15.

Q And did he go to school?

A Yes.

Q And was that the Harrison schools?

A Harrison High School.

Q Now I'm guessing, because I have got kids, too, it probably would have been junior high school, is that right?

A Yeah, ninth grade.

Q Ninth grade.

Now, in September of 1987, was school in session?

A Yes, it was.

Q All right. Do you remember the date of Sunday, September 13, 1987?

A Yes.

Q All right. Did you see your boy that day?

A Yes.

Q And that was a Sunday evening?

A Right.

Q Prior to that time, did you know a person who also lived in the community named John McRae?

A Yes.

Q How is it you know Mr. McRae?

A Just through -- mostly, I met him through another neighbor.

Q And who was that other neighbor?

A Dean Heintzelman.

Q Okay. So you were kind of mutual neighbors?

A Yes.

Q Did you ever have occasion to go to Mr. McRae's property?

A I was there once.

Q For what purpose, sir?

A I went with Dean Heintzieman when Dean went over to do some work on Mr. Heintzelman's well -- pump.

Q Mr. McRae or Mr. --

A I mean Mr. McRae's. I'm sorry.

Q Do you know if your boy ever went over to their property?

A Definitely, I can't say yes.

Q Do you know if Mr. McRae at that time, the summer of 1987, also had a son?

A Yes.

Q And was that Martin McRae?

A Yes.

Q Do you know if your son knew Martin McRae?

A Yes.

Q Did they ever get together and play?

A They'd gotten together, yes.

Q And you know that yourself?

A Yes.

Q Do you know if Martin McRae had ever been over to your house?

A He was there once.

Q When was that, sir?

A Back -- date, I don't actually -- it was in the summertime.

Q Let me ask you, does it refresh your memory as to whether or not it was within a couple days of Sunday, September 13, 1987?

A It could have been. I --

Q You're just not sure?

A I'm not sure of dates, sir.

Q That's fine.

What -- all right, Sunday, September 13, 1987, you saw your son, right?

A Right.

Q All right. The next day was Monday, September 14th?

A Yes, sir.

Q Now, on the evening before, did Randy talk to you about what his plans were for the next day?

A No. He had talked to his mother about it. But I --

Q Okay. As a family, did you have an understanding what was going to happen the next day?

A Right. That he was gonna go to a friend's house after school.

Q Did he mention that friend by name?

A Not that I remember him saying.

Q Okay. So the next day was Monday, September 14th. To your knowledge, did your son go to school?

A If the 14th was -- yes, he went to school.

Q That was a Monday, wasn't it?

A Right. It was Monday, yes.

Q He went to school that day?

A He went to school that day, yes.

Q And your family didn't expect him home that evening, did you?

A No, we did not.

Q Because he was going to go to a friend's house?

A Right.

Q What happened on the 15th?

A We got a call from the school shortly after morning attendance wanting to know how come he wasn't in school.

Q And did you take any steps to track down your son after that time?

A We went to the school to talk to them at school, and that's when stuff started, trying to find out where he was at.

Q And ultimately did you and your family actually file a missing person police report?

A Yes, we did.

Q And that was with the Clare County Sheriff?

A Yes, it was.

Q After the evening of -- well, let's say the morning of September 14, 1987, did you, or to your knowledge any member of your family, ever see your son again?

A My daughter seen him that evening, seen him that night when they were getting out of school.

Q At the end of school?

A Right.

Q And your daughter told you about that?

A Yes.

Q And other than that, did anybody in your family ever again see your son?

A No.

Q Did you hear from your son?

A No.

Q Do you know of any evidence that you or your family is aware of that would indicate that after September 14, 1985 -- '87, that your son was still alive?

A No.

Q Excuse me.

Mr. Laufer, before this case became an investigation did you have any reason at all to fear your son associating with Mr. McRae or his son?

A Before what now?

Q Before your boy disappeared.

A Yeah.

Q Did you have any reason to be afraid of Mr. McRae?

A No.

MR. BLUMER: Thank you.

MR. GREER: No questions, Your Honor.

THE COURT: You may step down.

Call your next witness, please.

MR. GAGE: Mike Heintzelman

CLERK GREEN: Raise your right hand to be sworn, sir.

Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. HEINTZELMAN: Yes, I do.

MIKE HEINTZEMAN

being first duly sworn at 10:55 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GAGE:

Q Good morning, sir. Would you state your name, spell your last name for the record?

A Michael Dean Heintzelman, H-e-i-n-t-z-e-l-m-a-n.

Q And, sir, how old are you today?

A All right.

Q I'm sorry, sir, how old are you?

A Twenty-five.

Q And back in 1987, how old would you have been, sir?

A I'd have to do the math, I guess. I would be 13, 14, 12. I don't know.

Q About what grade would you have been in, in 1987?

A Junior high, around eighth, ninth.

Q Did you know an individual named Martin McRae?

A Yes, I did.

Q How is it you knew Martin McRae?

A I met him on the school bus. We lived around the corner from each other.

Q Were you friends?

A Yeah.

Q What kind of things did you do together, if anything?

A Just we went scouting together, we just -- 4-H together just everything pretty much.

Q Did you know an individual named Randy Laufer?

A Yes, I did.

Q And how is it you knew Randy Laufer?

A I met him through school.

Q Did you do things with Randy Laufer?

A Yeah.

Q Now, sir, if you know, do you know whether Martin McRae and Randy Laufer knew each other?

A Yes, they did.

Q And, sir, if you know, did Martin McRae and Randy Laufer ever do things together?

A Yes.

Q And were you a part of some of the things they did together?

A A little bit.

Q What are some of the things that the three of yous might have done?

A Go out in the woods. I like to hunt a little bit. We would wander the woods together just things kids do together

Q And Randy would do these things with you and Martin?

A Yeah. Yeah.

Q Are you familiar with an individual known as John McRae?

A Yes, I am.

Q And how is it you know John McRae?

A He was Martin's father.

Q And back in 1987, sir, do you know where the McRae family lived?

A Yes. Right around the corner from me.

Q And do you know if Randy Laufer knew where the McRae family lived?

A Yes, he did.

Q Sir, did you ever have an opportunity that you seen Randy Laufer at the McRae home?

A Yeah, a few times.

Q More than once?

A Yeah.

Q Okay. Sir, changing gears, you indicated that you used to do 4-H and stuff with Martin?

A Yeah.

Q What was some of the 4-H projects that the McRae's worked on?

A Goats and a little bit of clowning.

Q Now the goats, raising -- you're talking about raising goats?

A Yeah.

Q About how many goats did the McRae's have, if you recall?

A It would vary. I would guess ten to 15. That's just a guess. I mean, I don't remember the exact numbers, but quite a few.

Q And what did they -- what would they do with these goats, if you remember, sir?

A More or less for 4-H. They drank goat milk.

Q And did they keep these goats penned up, or how would they have them?

A Most of the time. There was a few that roamed around, but they was mostly penned up.

Q Now, when you say "roamed around," you're talking about roaming around in their yard?

A Yes. They were just pets.

Q And did they have access to the entire area where the McRae's lived?

A Yeah.

Q And did they have access to the inside of the house?

A On a few occasions I remember seeing them in there.

Q Sir, do you remember when the McRae's moved?

A Not exact dates or nothing, but I remember the time.

Q The time frame?

A Yeah.

Q Was there a time after the McRae's had moved from their residence off Monroe Road that you were over at the McRae homestead

A Maybe a month or so later. It had been a while.

Q And did you make observations what the property was like at that time?

A Pretty much like it was when they were there.

Q And did you have a chance to look onside their -- the trailer they were in?

A I went inside the front door once.

Q And what did you see when you went inside?

A Just things around, few dishes here and there, one or two chairs. I think the table was still there. Just a few odds and ends. It was kind of cluttered from moving or whatnot

Q Did it strike you as odd that somebody would move and leave all their possessions?

A Well, a little bit.

Q Why is that, sir

A Well, I mean, if I had all that stuff accumulated I would have took it. I mean. . .

MR. GAGE: I have no further questions, Your Honor.

MR. GREER: No other questions, Your Honor.

THE COURT: You may step down.

Call your next witness.

MR. BLUMER. The People call Dr. Laurence Simson to stand, please.

CLERK GREEN: Would you raise your right hand, please.

Do you solemnly swear the testimony you are about to

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MR. BLUMIER: Yes, Your Honor. Before you bring in the jury, may counsel and I approach the bench?

THE COURT: Yes.

(All three counsel approached the bench.)

MR. BLUMER: We're ready, Your Honor.

THE COURT: All right. Bring in the jury, please.

(Jury entered the courtroom.)

THE COURT: You may be seated.

Call your next Witness.

MR. BLUMER: Thank you, Your Honor.

The People call Mr. Eric Kaiser to the stand.

CLERK GREEN: Raise your right hand, sir.

You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. KAISER: I do.

ERIC KAISER,

being first duly sworn at 1:17 p.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good afternoon, sir. Would you state your name for the record, please?

A My name is Eric Kaiser.

Q Could you spell your last name, please?

A K-a-i-s-e-r.

Q Describe for the jury, please, how you are employed.

A I'm an attorney, and I'm with the Macomb County Prosecutor's Office serving as the chief trial attorney. I have been a prosecutor for about 18 years.

Q In the capacity of being the chief trial attorney, did you receive a phone call from me, perhaps as long as a year ago, asking if you could determine whether or not the records of your agency still existed concerning a criminal homicide prosecution in 1950?

A I do recall that telephone call.

Q And was that request related to the prosecution of John Rodney McRae for the death of a victim flamed Joey Housey?

A Yes, it was.

Q Am I correct, sir, that the files indicated that Joey Housey was an eight-and-a-half-year-old boy who died at the hands of Mr. McRae?

A Yes, they do.

Q And were you able to locate the files of your office pursuant to my request?

A We were able to locate one box of files, yes.

Q And was that file -- could you describe how that file was stored, please?

A It was stored in a county building about a mile from the courthouse. And there's a lengthy tracking system that they use to enable us to retrieve files that are as old as this one was. We made the call to the supervisor of that building, told them the file name, and our file number. We have our own tracking system in our office with just a card file. And they were then able to locate this file on a particular shelf with a number existent.

Q Is that file that you have before you, between you and the jury box, the official file for the storage of the prosecution documents related to the 1950 case against Mr. McRae?

A Is it all right to take a look at a few things?

Q Please do.

A Okay. In looking at the top of this box, it shows the actual information for the request that you made last December and our request to the filing room. And then the sheet on the side of the box is a yellowed, old sheet, contains the

number for the row, of the section, the shelf and the position of this box where it was stored from when it was first put there. And so this is the box that you called about. And the one that I retrieved and reviewed.

Q Does that box constitute the official files of the Macomb County Prosecutor's Office with respect to the prosecution of John McRae in 1951?

A Yes, it does.

Q Is it the -- is it required as part of the business practices of your office to store such files, particularly those in homicide cases, without a fixed determination of time?

A We'll generally keep them for as long as there's any possibility that we might need them, and that means forever, in most instances.

Q And is -- are those files -- is it necessary that those files be stored in their original condition?

A Yes, they're stored in their original condition, as well as on microfilm.

Q To your knowledge has that file been disturbed since -- well, it was used for a 1971 appellate issue, is that correct?

A That's correct.

Q Other than having used that file again in 1971 for appellate issues, has that filed remained in its original condition in your office?

A It has.

Q Did you review the history of that case at my request?

A I did.

Q And is it correct sir, that the prosecution of your office against Mr. McRae surrounded the violent death of a young, eight-and-a-half-year-old child named Joey Housey?

A Yes, it did.

Q In 1950?

A Yes, sir.

Q At that time I believe the defendant was approximately 15 years old, is that correct?

A That's my understanding, yes.

Q Is it also correct, sir, that the result of your office's prosecution of Mr. McRae in 1950 was that the jury found him criminally responsible for the death of Joey Bousey?

A That's also true. They did.

MR. BLUMER: Your Honor, furthermore, at this time I would like the jury to be aware of a stipulation between counsel that the contents of that file were made available to the State's expert witnesses for their various conclusions.

MR. GREER: That's correct, Your Honor. We would so stipulate.

THE COURT: All right.

MR. BLUMER: Thank you, Mr. Kaiser. I have no further questions.

THE COURT: Any cross-exam?

MR. GREER: No, Your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you, Your Honor.

MR. BLUMER: Your Honor, the People now call Dr. Norman Sauer to the stand.

CLERK GREEN: Raise your right hand, sir.

You do solemnly swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

DR. SAUER: Yes, I do.

THE COURT: Have a seat over here, please.

DR. NORMAN SAUER,

being first duly sworn at 1:23 p.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good afternoon sir. Would you state your name again for the record, please.

A Yes, my name is Norman J. Sauer, S as in Sam, a-u-e-r.

Q Thank you. Would you tell the jury, Please, how you're employed?

A I am a professor of anthropology at Michigan State University.

Q And have you specialized at all in your practice?

A Yes, I have. Yes, I have. I am a specialist in a field known as forensic anthropology.

Q Would you describe Your training and experience that brought you to that field, please?

MR. GREER: Your Honor, we're willing to stipulate to his expertise as a forensic anthropologist

MR. BLUMER: Your Honor, on this occasion I would like the jury to hear this and to assess for themselves.

THE COURT: You may proceed.

MR. BLUMER: Thank you.

THE WITNESS: Forensic anthropology is a subdivision of the field of anthropology. And you're all probably familiar with some things that anthropologists do. Archeologists are people who study the past by excavating human remains from times past. There are

cultural anthropologists who study different people around the world. And if you read National Geographic sometimes you see stories about primitive and advanced people from around the world. And then there's a group of anthropologists who specialize in human biology. And that's what I do. And my interest in doing that stems from an interest in -- partly in how people have changed through time. And to study the human biology the human biology of the past, I focus on the human skeleton. And so that we can answer questions about human evolution, things like that, I have to be able to look at a skeleton and learn as much about a person as I can from looking at their bones. To apply those same kinds of skills to medical cases and legal cases is a sub field of what I do known as forensic anthropology. Forensic anthropology is the application of human skeletal biology t medical legal issues. And that's area that I am dealing with today.

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Next slide. And here's a close-up of that cut mark. The reason that I show you that cut mark is that it's very difficult for me to understand how that cut mark could be inflicted while this body was still -- or person was still intact, still in one piece. In fact, the evidence shows overwhelmingly that there was an attempt here, and apparently successful attempt, to cut the body in half in the region of the lumbar vertebrae, between the ribs and the pelvis.

Next slide. Um, there's some more evidence about disarticulating or taking the remains apart. We go back up here to the third lumbar vertebra, the top one. And this cut here is quite interesting. We haven't seen this one yet. And this is the left side sort of obliquely. It would be over on the left side sort of -- sort of over in this region right here on the vertebra.

Next slide. And that deep cut is a continuation of this cut right here. All right. So this cut here that starts up here on the right side, continues over to the left side, and then down; but actually what it refers to is --what it's showing -- is there is a deep cut into that vertebra -- if you could back up -- that's at least that deep.

Go ahead, please. Now that cut mark is – was probably made by force that came from the top. Because of

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column. I hope you can see that down here. It's a small triangular bone between the hip bones, right in here. And basically that's what the sacrum looks like.

I want to direct your attention to the left side of sacrum up near the top, right in this region right there, where I have identified several cut marks.

Next slide. This just zooms into that area. And already you can see a cut mark right here that might be -- you might be able to clarify that, focus that a little bit. Yeah. Perhaps you can see that cut mark on the interior surface of the sacrum just here.

Next slide. Well, we zoomed in a little further, and you can see that that cut is really quite distinct,

Next slide. Uh, yes. And if we go on even further you can see there is evidence for one cut, two cuts, and at least three cuts in that area on the anterior part of the sacrum.

Next slide. And there's a close-up of one of the bottom cuts. These are fine cuts that were made in a -- what we call a cranial coddle or superior/inferior direction. They go up and down, and they're right in this region right here.

Next slide. And to refresh your memory, they're on the left side of the sacrum.

Next slide. I think that's all the slides that I have to show.

(Witness seated back in the witness Chair.)

BY MR. BLUMER:

Q Dr. Sauer, in your opinion, could anyone have lived through the assault that you described on that skeleton?

A No, sir.

Q Can you think of any rational explanation for the cut marks on the inner surface of the sacrum other than --

MR. GREER: Your Honor --

THE COURT: Don't lead, counsel.

BY MR. BLUMER:

Q Do you have a possible explanation for how the cut marks were derived on the inner surface of the sacrum?

A Yes. If you look at the skeleton, you can see that the sacrum during life would be protected by an awful lot of soft tissue, particularly in the region of the gut, and to me, the most likely access to the anterior part of the sacrum for a cut mark in that direction would be through anal region or the urogenital region. That is, up through the bottom.

Q And there were at least three separate cut marks there?

A Yes, there were.

Q Can you think of any other method by which that area could have been reached with a knife, any other rational explanation in your mind?

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MR. BLUMER: Your Honor, the People now call Dr. William Lovis.

CLERK GREEN: Raise your right hand, sir.

You do solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

DR. LOVITZr I do.

THE COURT: Be seated.

DR. WILLIAM LOVIS,

being first duly sworn at 2:37 p.m., testified on his oath as follows:

DIRECT EXAMINATION

MR BLUMER:

Q Good afternoon, sir.

A Good afternoon.

Q Could you tell the jury who you are, please.

A William Anthony Lovis, Jr.

THE COURT: How do you spell your last name?

THE WITNESS: L-o-v, as in Victor, i-s.

BY MR. BLUMER:

Q Would you tell the jury what training you have and what your current position is? How are you employed?

A I'm employed by Michigan State University as a professor of anthropology arid curator of anthropology. I have a doctorate in anthropology with a specialty in archeology.

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accomplished only extended approximately four feet inside the barn, the long barn wall, the south side of the barn wall. At a point four feet inside, that excavation was only about a foot deep. By the time it reached the barn wall here, it was approximately four feet deep on a very sharp angle here.

Outside the barn wall, directly outside of the barn wall -- and this would be the driveway area here -- the deepest part of the excavation was at about five feet in depth, and then as you can see, the remainder of the backhoe excavation extended 11 1/2 feet beyond the barn wall. So this would be a slice across the front of the barn establishing what had actually been excavated by the backhoe.

The deepest part of the excavation, therefore, was approximately a foot or so outside of the barn wall and extended to a depth of about five feet. And I believe that might be the last slide.

Q Leave it on. I may want to go back to it.

Doctor, based on your findings that you have described for the jury, do you have a professional estimate as to the most probable location for where the body was buried?

A The most likely location that the human remains would have been recovered from would have been directly outside the barn wall.

Q In that five foot part of the pit?

A In the five foot part of the pit.

Q All right. If we take your assessment that the body was most likely placed immediately outside the barn wall in the deepest part of the excavation -- and am I correct that if I go back to this photograph here, that it was -- where would you put it in relation to the tire on the side of the barn?

A Just in -- just above the tire outside the barn wall.

Q Am I correct that -- in pointing to that area?

A Yes.

Q So according to the photograph, just in front of the tire with relation to the abandoned hut or house?

A Yes.

Q All right. Now, if we assume because of your calculations that the body was placed just in front of tire and just outside of the barn wall, how far was that from the door of the trailer that's also demonstrated on that photograph?

A It should have been no more than -- and may I check my notes on that?

Q Sure.

A Just to be certain.

It would have been approximately 15 feet from the front door.

Q If the body had been buried at the furthest distance possible within the excavation site, how far would it have

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(2:59 p.m. — Recess.)

(3:40 p.m. - Proceedings reconvened.)

THE COURT: You may be seated.

Bring in the jury, please.

(Jury returned to the courtroom)

THE COURT: You may be seated.

Call your next witness.

MR. BLUMER: Thank you, Your Honor.

The People call Mr. Patrick Agin.

CLERK GREEN: Raise Your right hand, sir.

You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

CLERK GREEN: Have a seat in the witness chair.

PATRICK AGIN,

being first duly sworn at 3:42 p.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good afternoon sir.

A Good afternoon

Q Is it correct your name is Pat Agin?

A Yes, it is.

Q Could you spell your last name, please?

A A-g-i-n.

Q Mr. Agin, you were originally scheduled to come in tomorrow, is that right?

A Yes, it is.

Q And we just pulled you off the job to get here this afternoon is that right?

A Yes, it is.

Q Okay. You don't have to be embarrassed about blue jeans and T-shirt then.

A Okay, thank you.

Q How old are you, sir?

A I'm 24.

Q Where did you grow up?

A Harrison, Michigan.

Q When you were in junior high school, did you know a boy named Marty McRae?

A Yes, I did.

Q Who was his father?

A Pardon?

Q Who was Marty McRae's father?

A John McRae.

Q Do you see John McRae in the courtroom?

A Yes, I do.

Q Where is he?

A He's the gentleman sitting right there with the blue suit on.

Q What was your relationship with Marty McRae at the time?

A We were good friends.

Q Did you know Randy Laufer?

A No, I did not.

Q Did you know who he was?

A No, I did not.

Q In the time that you were friends with Martin McRae, did you ever go over to their house?

A Yes, I did.

Q Where did he live?

A On Monroe Road.

Q And that was in -- just outside of Harrison?

A Yes.

Q About a mile and a half south of the city, is that correct?

A Probably a couple miles south, yeah.

Q Let me show you a photograph which has been marked as People's Exhibit No. 1. Do you recognize this photograph, sir?

A Yes, I do.

Q What is it?

A It's the McRae land and house.

Q Is this the way it looked in 1987 when you used to pal around with Marty McRae?

A Yes, it is.

Q At the time period that you knew the family in 1987, let's specify the summer of 1987, June, July, August and September of 1987, where was the family living on this property?

A In the green trailer.

Q All right. This is a cabin-type house, is that right?

A Yeah, they used that for storage.

Q All right. Nobody lived in that house?

A No.

Q And what is this building here?

A That was the barn where they kept their goats and a couple rabbits.

Q Did the goats go anywhere outside of the barn on that property?

A Yeah, they ran all over the property.

Q All right. Including this area in here and in the driveway between the two buildings?

A Yeah.

Q They were all around the area?

A Yes.

Q But the family lived in this building here?

A Yes, they did.

Q All right.

Q Mr. Agin, were you ever inside the family home?

A Yes, I was.

Q On more than one occasion?

A Yes.

Q Many occasions?

A Yes.

Q Do you know if there were any firearms in that home?

A Yes, there were.

Q Did you see them with your own eyes?

A Yes.

Q Did you ever see anybody in that family use those firearms?

A Yes.

Q Who?

A John and also Martin.

Q Can you describe the firearms that you recall being in that house?

A One was a .22 rifle, and the other was a shotgun.

Q Can you be more specific about the .22 rifle? Can you be as specific as possible in describing the .22 rifle, please?

A .22 long gun, single shot.

Q What type of action did it have?

A It was just bolt action.

Q So it was a .22 rifle, single shot, bolt action?

A Yes.

Q Was it a new or an old weapon?

A I'd probably say a newer one for that time area.

Q That's ten years ago?

A Yeah.

Q All right. And you actually saw that weapon yourself?

A Yes.

Q And did you ever see anyone shoot that weapon?

A Yes.

Q Who?

A John and Martin,

Q Where was that gun kept?

A In the house. Specifically in the house, I couldn't tell you.

Q Is that where you saw it?

A I seen it in the house, you know, when they would get it out to go and shoot it, target practice, and outside the house.

Q When was the first time anyone involved in law enforcement ever asked you whether you had seen a firearm in that house?

Let me put it to you this way. Was it in within the last six months?

A Yes.

Q In all the history of this case, it was the last six months that anyone ever asked you about a gun?

A I would probably have to say yeah.

MR. BLUMER: Thank you, sir. Nothing further.

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THE COURT: You may step down.

THE WITNESS: Thank you, sir.

THE COURT: Call your next witness.

MR. BLUMER: Your Honor, the People call Dr. Robert Mogy.

THE CLERK: Raise your right hand, sir.

You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

DR. MOGY: I do.

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good morning, sir.

A Good morning.

Q Would you state your name for the record, please?

A It's Dr. Robert B. Mogy, M-o-g-y.

Q Thank you. What type of doctor, sir?

A I'm a -- I have a doctorate in clinical psychology.

Q And where are you employed?

A At the Michigan State Center for Psychiatry -- Center for Forensic Psychiatry.

Q And that's in Saline, Michigan?

A Saline, Michigan.

Q Just south of Ann Arbor?

A It has an Ann Arbor mailing address, but where it actually

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that, and that falls within the realm of the principles of forensic psychology. And I don't anticipate getting beyond that. And I hear your objection. I'm afraid we're getting beyond that if we get into general definitions of sexual sadism, and I don't want general definitions of sexual sadism because we'll be all over the lot. I want it confined to what we're talking about in this case.

MR. BLUMER: I'll keep that track in my questioning, Your Honor.

MR. GREER: Thank you, Your Honor.

THE COURT: All right. Bring in the jury please.

(10:10 a.m. - Jury returned to the courtroom.)

THE COURT: You may be seated.

DIRECT EXAMINATION

CONTINUED BY MR. BLUMER:

Q Doctor, still drawing your attention to the factors known to you about the 1987 case. I believe you testified to the jury that because of those factors you were able to reach a conclusion as a forensic psychologist as to a possible motivating factor, is that correct?

A Yes.

Q And what was your conclusion as to that possible factor?

A Well, there were, I believe, three scratch marks on the sacrum which had been identified as almost certainly having come from penetration by a knife of the anal or genital -- urogenital region. It is not necessary to do that in the course of killing someone, nor is it necessary to do that in the course of cutting up the body. Therefore, it strongly suggests that there was a sexual component. And in conjunction with the tying or ligatures, it suggests that that was a sexually sadistic component; i.e., the desire to in some way inflict pain upon this person, possibly with sex, before or after the homicide.

Q And in your experience, is sexual sadism a motive which is strong enough to have actually compelled the crime in the first place?

A Yes, it is.

Q Now, let me direct your attention to the crime in 1950 for which the defendant was convicted in 1951. We were -- earlier on in your testimony we were in the process of explaining to the jury those pieces of information which had at your disposal.

A Yes.

Q Again, to refresh the jury's mind, sir, did you have at your disposal two different -- at least two different statements made by the defendant to the prosecutor in that case on consecutive days?

A I think so.

Q And did you have at your disposal statements made by the defendant's father to investigators during the course of that case?

A Yes.

Q Did you have at your disposal photographs of the victim in that case, both as he was found at the scene and as he was being prepared for autopsy?

A Yes.

Q And did you have at your disposal the results of the autopsy in that case?

A Yes, I did.

Q All right. Having had that various information at your disposal, sir, were you able to make any conclusions as a forensic psychologist about whether or not there was any apparent motive involved in that crime?

A I believed that there was a sexually sadistic motive in that crime.

Q Would you tell the jury why you feel that way.

A Well, the individual in question was first strangled.

Q By individual, you're referring to the victim?

A The victim, yes, was first strangled, then the victim's throat was slit with a razor, a sharp object later discovered to be a razor. This was done several times. But that was not the only cutting done to the body. And although that

would have been sufficient to produce death, when the body was found, the body was also found to have had the penis severed almost to the scrotal area. So it was essentially cut off, would have fallen off if the -- if someone had severed the scrotal sac. But basically, that is completely unnecessary to having killed that victim. It again suggests a sexual motivation, and it again suggests a sadistic motivation. Dismemberment of a body not necessary for a homicide certainly reflects the possibility of another motivation, and I think in this case it's pretty clear what that might be.

Q And it's, clear to you that that was?

A I believe that that was a sexually sadistic crime.

Q And again, sir, the sexual sadism that you found to be demonstrated in the 1950 crime, was that a motivation sufficient to have actually caused that crime to occur?

A Well, it's unclear to me exactly why that crime was caused to occur or whether the sexual mutilation occurred prior to or subsequent to the death. But it is clear to me that there was a sexual, component to the death at some point. And I believe that was sufficient to justify it as being characterizable as a sexual -- as a sexually sadistic crime. The postmortem mutilation, that's not the most common, if it is a postmortem mutilation. Now it could have been a --

THE COURT: Why don't you wait for a question.

THE WITNESS: Sorry.

THE COURT: We're rambling on.

THE WITNESS: Sorry.

BY MR. BLUMER:

Q Well, let me ask you this. Does your conclusion that the first crime, 1950, gave evidence of sexual sadism alter whether the mutilation to the sexually-oriented mutilation to the body occurred before or after death, does that alter your opinion either way?

A No.

Q So either way, whether the mutilation occurred pre- or postmortem, is it still your opinion that there was a sexually sadistic motivation involved?

A Yes.

MR. BLUMER Thank you. Nothing further, Your Honor.

THE COURT Cross-exam.

MR. GREER Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GREER:

Q Good morning again, Dr. Mogy.

A Good morning.

Q The information that you reviewed concerning the 1987 -- or actually 1997 when the body was discovered, Randy

Laufer's remains, you testified that you believe that the ligatures on the ankles meant that the legs were tied together?

A At some point, yes.

Q Were you aware that the trace evidence and the various

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intent in this case and for no other purpose.

So this is a limited purpose that these individuals are testifying to, and any testimony that they rendered is to be limited to the issue of motive or in Dr. Dietz's case, the issue of motive and/or intent.

So you may call your next witness.

MR. BLUMER: Thank you, Your Honor.

The People now call Dr. Park Dietz to the Stand.

THE CLERK: Would you raise Your right hand, sir.

You do solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

DR. DIETZ: I do.

DR. PARK DIETZ,

being first duly sworn at 11:03 a.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good morning, sir.

A Good morning.

Q Could you state your name for the record and spell your last name, please?

A My name is Park Elliott Dietz, D-i-e-t-z

Q And how are you employed sir?

A I'm a forensic psychiatrist; that is, a physician specializing in psychiatry and my practice is limited to forensic psychiatry.

Q Before we go any further, Doctor, we brought you here from California for the purpose of this testimony, is that correct?

A Yes.

Q So it is eight o'clock in the morning by your body's time, is that right?

A That's right.

Q Now, Doctor, could you tell the jury, please, what training and education that you've had in preparation for your career as a forensic psychiatrist?

A I graduated from Cornell University in Ithaca, New York, with a bachelor's degree in psychology and biology in 1970, I received a medical degree; that is, an M.D. degree, from the Johns Hopkins University School of Medicine in Baltimore in 1975. And in the same year I received a master's degree in Public health, also from Johns Hopkins. I had by that time finished everything except the

dissertation for a Ph.D. in sociology as well, and eventually I wrote that dissertation and was awarded the Ph.D. from Johns Hopkins

In 1975 I began a residency program in Psychiatry at the Johns Hopkins Hospital. For any of the medical specialties to be able to be board certified and proclaim

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Quite a few Serial killer Cases. Arthur Shawcross in Upstate New York. James Swann in Washington D.C. Joel Rifkin on Long Island. Zada, the New York zodiac case. That's just a partial list of them.

Q Were you involved with the government's investigation of the unibomber case?

A Yes, I was the government's expert. I had both been involved in the investigation on behalf of the FBI, and later had a much more central role in the evaluation after he was identified, in the event there was going to be an insanity trial.

MR. BLUMER: Before I go further with this witness, Your Honor, I now offer him as an expert in the field of forensic psychology.

THE COURT: Mr. Greer.

MR. GREER: Thank you, Your Honor.

VOIR DIRE EXAMINATION

BY MR. GREER:

Q Good morning, Dr. Dietz.

A Good morning.

Q Have you testified in Michigan courts before?

A I should have prepared for that question and looked it up.

Q You don't recall specifically at this point?

A Well, I'm not sure. I'd have to think about it.

Q What is your understanding of the type of evidence and the type of analysis that you're here to do and to render an opinion on today?

A My understanding of what I'm being asked to do is to look at crime scene and autopsy evidence, and from that crime scene and autopsy evidence to offer opinions with respect to the behavior of the offender; specifically, motivation and intent.

Q Now, is that particular type of analysis and that type of opinion based on that type of evidence something that is generally accepted within the scientific community of which you're a part of?

A Yes, it is.

Q Something -- have you offered testimony before in courts in that particular area?

A Yes, I have.

Q Based on similar types of evidence?

A Yes.

MR. GREER: Thank you.

Nothing further, Your Honor.

THE COURT: Any objection?

MR. GREER: No, Your Honor.

THE COURT: All right, the doctor may testify in the area of forensic psychiatry, specifically in the terms of motivation and/or intent.

MR. BLUMER: Thank you, Your Honor.

BY MR. BLUMER:

Q Doctor, in preparation for your testimony before this Court, were you given knowledge of certain facts of two different crimes?

A Yes.

Q One of those was the crime which is before this jury now, and that was the discovery of the body of Randy Laufer who disappeared in 1987?

A That's correct.

Q And the second crime we asked you to consider was a crime with which the defendant was convicted in 1951?

A That's correct.

Q All right. Now, would you tell the jury, please, what information you had at your disposal, what conclusions you have reached about the facts of the 1987 case?

A Yes.

MR. GREER: Your Honor, I object, I guess, to the form of the question. That appears to be calling for a conclusion that would be beyond the area that's been discussed as the testimony or the expertise area that he is going to be testifying about. It's a pretty broad question, Your Honor.

THE COURT: Well, you used the word "facts," and that's up to the jury to decide what the facts are. Just tell us what evidence that you felt was significant in terms of any opinions that you are going to be giving in this case from the 1987 situation.

THE WITNESS: Yes, Your Honor.

I was given information concerning the discovery of skeletonized remains in 1997. The condition of those remains, the materials found in association with the remains, the reconstruction of the skeleton, the anthropological opinion, the autopsy report, and an overview, of the archeological evidence that was already presented to the jury.

THE COURT: Okay, go ahead. Ask a question.

BY MR. BLUMER:

Q Doctor, of the facts made known to you about the 1987 case, do you feel that any of them are significant from the perspective of a forensic psychiatrist?

A Yes.

Q Would you tell us what those are, please?

A Well, the most important evidence from the 1987 case, from my professional point of view, is first that the victim in 1987 was restrained; that is, the rope found around the lower leg on each lower leg is evidence of restraint. Specifically, what I'm relying on for that is that there were two socks found. Each sock contained a complete set of foot bones, and around the top of the sock was a portion of a length of rope.

The fact that the bones were found in the socks indicates that the facts were still on -- the socks were still on the victim at the time of being placed in the grave. The rope around the top of the socks indicates that prior to death the victim was restrained. And I say that because I've never seen a case of anyone restraining a victim after death. Restraints are applied prior to death.

The second important fact, from my point of view, is that the only bones that were found inside clothing were the foot bones inside the socks. Most of the bones from the body were found in that grave, and in that grave was a pair of jeans. The pair of jeans inside the grave had the button unbuttoned and the zipper was pulled down. And the long bones of the legs were not inside the jeans at the time of recovery. From that, I conclude that at the time the victim was placed in the grave, he was naked, apart from his socks.

And the third important piece of evidence is the markings on the inner surface of the sacrum that the anthropologist identified, which I regard as evidence that there was genital mutilation with stabbing through the rectum or genital area, and the instrument making marks on the inner surface of the sacrum. Those three facts; the restraint, the nudity except for socks, and the genital

mutilation, are the basis of my opinion that this was a sexual homicide.

Q You say it's a sexual homicide. Is there anything more to you as a psychiatrist by way of describing a possible motivation attributable to this crime because of what you perceive to be significant facts?

A Yes. Sexual homicides have been described in various ways by authorities in the field for more than a century, and they use different terms to describe this. The most common terms used to describe this kind of homicide; that is, a sexual homicide, are "lust murder" or "sexually sadistic homicide."

When we do a somewhat more technical analysis to understand precisely what occurred, the important distinction is whether the sexual component occurs before death or after death. And in this case, we know that there is at least the restraint prior to death. Restraint is used sexually as a means of controlling the victim, and in order to enjoy seeing the victim bound and helpless. And so from this evidence that's available, we can tell that there was sadistic sexual activity prior to death. We don't have a way to know from this evidence whether there was rape prior to death or sexual assault after death, and we don't have a way to know how much injury was done prior to death versus how much after death. If we knew that, it would make a difference in the technical classification as whether we would call this sexually sadistic homicide where there is torture prior to death, or whether we would call it a necrophilic homicide where the sexual motive is to have sex with the corpse, and the mutilation after death would be designed to fulfill the fantasies of total control over another human who's already dead.

What we can be sure of is that it is a sexual homicide and that the motive in the sexual homicide is that of having complete dominance, complete control, and destroying the objective sexual desire. When we have that information about motive to control, to dominate, and to destroy the object of sexual desire, that allows us to understand what the intent was. The intent here is total possession of another human, the freedom to do whatever one wishes, whatever the killer wishes, to the victim's body, and to be able to destroy the victim. And in this particular case, the destruction is severe with the actual bisecting or cutting in half of the body.

Q Dr. Dietz, is that motivation that you have just described sufficiently powerful in your experience to have actually created the impetus for this crime?

A Without question. I have seen many examples of offenders who for those motives have committed homicide.

Q Now, Doctor, let me draw your attention to the case in 1950 with which the defendant was convicted in 1951. Would you tell the jury -- well, first of all, let me ask you. Were you provided information about two, or perhaps three, independently made statements by the defendant to the prosecutors and investigators in that case?

A Yes, I was.

Q And were you also given access to a description of the defendant at the time by his father?

A Yes, it's his father's statement.

Q His father's statement?

A Yes.

Q Were you also given access to the autopsy report in that case?

A Yes.

Q And were you given copies of photographs of the eight-and-a-half-year-old victim in that case, both at the scene of the crime and as he appeared when being prepared for autopsy?

A Yes.

Q All right. Did you also have some information from investigators in that case?

A Yes, I had some police reports.

Q Now, Doctor, based on what was made available to you about the 1950 homicide, were you able to reach any -- did you find any of those factors significant to you as a forensic psychiatrist?

A Yes, I did.

Q Would you tell for the record, please, what factors you thought were important to you being able to analyze that crime?

A I will. May I add that I have not had an opportunity to examine the defendant and that my opinion is thereby limited --

Q Sure.

A -- to those that can be based on the data we're talking about.

MR. GREER: Your Honor. Would the Court excuse the jury, please.

THE COURT: All right, members of the jury, you will be excused.

MR. GREER: May we approach the bench, Your Honor?

(11:28 a.m. - Jury excused.)

THE COURT: The record should reflect the jury is no longer in the courtroom.

MR. GREER: May we approach the bench, Your Honor?

MR. BLUMER: Let's do this on the record.

THE COURT: Well, just make the argument.

MR. GREER: Thank you.

Your Honor, my objection specifically is the area that his testimony is heading toward, which is some sort of speculation or scrutiny of the defendant. The evidence, by my understanding, what his analysis is to be restricted to was the physical information concerning the 1950 crime. Any inferences that he can draw regarding the possible motivation of an individual based on that is something that

is admissible. But if he starts then offering information beyond the fact that the defendant was the individual that committed that particular crime, that appears that he is going to start doing some sort of analysis of John in the 1950 situation, which is beyond the scope of my understanding of what the Court is allowing his testimony for. And possibly one of the reasons --

THE COURT: Well, what is your objection at this point? What are you objecting to, to no longer occur, or what is it that you are objecting to that is about to occur?

MR. GREER: My objection is that it appears that what is about to occur -- I have two objections. Objection that it appears that he is going to be testifying beyond the area to which the Court had limited the prior acts evidence, that being strictly regarding motivation as determined or as evaluated based on the physical evidence and the physical facts concerning the 1950 homicide.

THE COURT: What's the second portion?

MR. GREER: The second, I'm concerned about his statement that he made that he hasn't evaluated my client, as if for some reason there is a need to, or -- I'm concerned that that's prejudicial for the jury to have heard that.

THE COURT: All right. As far as the first one is concerned, he's already given his testimony based simply on the evidence as related to him concerning the 1987 case. That's what he is going to be doing on the 1950 case, and nothing else.

I don't know why he gave us the gratuitous statement, if you will, concerning the failure to have --

MR. BLUMER: May I respond to that issue?

THE COURT: Yes, you may.

MR. BLUMER: Specifically, Dr. Dietz is required to place a statement like that on the record as a condition of his certification. Because he is a certified psychiatrist who did not specifically examine the defendant, he has to make it clear on the record that he did not do so and, therefore, his -- and the complete statement was and, therefore, my conclusions are limited to those which can be drawn from the facts of the crime itself. Maybe Mr. Greer didn't hear that last clause of the doctor's statement. It is in fact a required statement for the doctor to put on the record because he is a certified psychiatrist.

In addition, Your Honor, I would like to remind the Court that Mr. Greer essentially opened the door to the doctor not having examined his patient. In his opening statement, he told the jury that our two psychiatric experts had never examined his client. That was a statement made by the defense in opening statement. All we're doing is explaining that it has nothing to do with Dr. Dietz's conclusions on this record. That was the full impact of his statement just now.

THE COURT: Mr. Greer.

MR. GREER: If I may respond to that aspect, Your Honor. That was based on the comments of counsel in his opening statement, which I believe went beyond the scope of what is going to be coming in, in terms of

testimony. It was a reaction to statements that he made that I felt an answer needed to be placed on the stand. As matters have subsequently developed in the trial, things discussed are not going to be coming into evidence so that I would not expect him to be touching on them in closing, nor would I be touching on them in closing.

THE COURT: All right, Doctor, your statement concerning the not examining, or examining the defendant, complete your answer on that then.

Does that have something to do with your certification or something like that or --

THE WITNESS: I'll explain it, Your Honor.

THE COURT: All right.

THE WITNESS: The American Academy of Psychiatry and the Law, of which I have been president, has a set of ethical guidelines for the practice of forensic psychiatry. One of the guidelines is that in the interest of insuring objectivity and integrity, a witness who has not examined a defendant must disclose and indicate that no examination was conducted, and that the opinion is thereby limited. And since I hadn't been asked to do it I volunteered it, since I have to have it on the record. I'm aware, of course, that I can't indicate why that interview didn't occur.

THE COURT: Mr. Greer.

MR. GREER: I am not doubting the validity of his explanation, Your Honor. Like I say --

THE COURT: And your objection is what then? What is your objection?

MR. GREER: My objection at this point then is withdrawn. If we can give an explanation to the jury that there was no particular reason why, you know, he would be examining the defendant.

MR. BLUMER: Your Honor, I think we ought to just drop it at this point. I don't see that enhancing it in the jury's presence is going to help either side in this matter. Dr. Dietz put a statement on the record that his opinion is limited because he has not examined the defendant. I think it ought to end right there. I think it's a neutral statement.

MR. GREER: I'm not satisfied with that, Your Honor, if there is no further indications from Dr. Dietz's testimony regarding any type of assessment of my Client.

MR. BLUMER: That was never the intent of this testimony, Your Honor.

MR. GREER: I recognize that. I was just afraid where things were starting to head when the statement came on the record

THE COURT: Well, what do you want to occur at this point? Do you want some type of statement to the jury or --

MR. GREER: No, Your Honor

THE COURT: All right. So we'll just continue then at this point in time?

MR. GREER: Yes, Your Honor, I'm satisfied with that.

THE COURT: All right. Bring the jury in, please.

(11:35 a.m. - Jury entered the courtroom.)

THE COURT: You may be seated You may proceed.

MR. BLUMER. Thank you.

BY MR. BLUMER.

Q Doctor I think I was asking you at the time of the break we just took whether any of the facts made known to you about the 1950 case were of significance in your opinion in reaching a psychiatric estimate of the motivation behind that crime?

A Yes.

Q Would you explain to the jury, please, what factors you thought were particularly significant to you in your profession?

A There were three sets of facts that I found particularly significant. The first is that the victim in the 1950 homicide had experienced an anal laceration; that is, a small tear around the anal opening. Second the fact that I found significant was that at the time that the body was recovered and brought up, the victim was still wearing underwear and pants that had been pulled down almost to the level of the knees. And his shirt had been pulled up to

the level of the bottom of the rib cage; that is, exposing the sexually significant parts of the body. And the third is the genital mutilation that had occurred. Specifically, the penis had been cut through; that is, severed though it was still attached by a -- by the skin to the scrotum. That is, it was not removed from the body, but it had been completely severed from its usual position. Those three facts are sufficient to indicate to me that this was a sexual homicide, and are sufficient to indicate to me that the motives for this sexual homicide were dominance, control, and destruction of the object of sexual desire. Now, from that --

THE COURT: Well, let's ask some more questions.

BY MR. BLUMER:

Q The -- I believe you said that the motive was destruction of the object of sexual desire and control over the victim is that correct?

A And domination, yes.

Q Are those characteristics symptomatic of a particular motive?

A Yes, in a sexual homicide they are.

Q That this was a sexually oriented homicide?

A Yes.

Q And again, is the motive that you perceived from the evidence of that case of sufficient power to have impelled the commission of the crime in the first place?

A Well, I wouldn't use the word "impelled" for this or any other motive. But the evidence of sexual motivation here is certainly sufficient to account for a killer taking a life. Again, I have seen many murders motivated for these reasons that were done in similar ways. And that's the principle motive.

MR. BLUMER: Excuse me, Doctor. One moment, please.

May I have one moment Your Honor, please?

THECOURT: Yes.

MR. BLUMER: Doctor, thank you very much.

Your Honor, we have no further questions.

THE COURT: Cross-exam

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TRAVIS TROOST,

being first duly sworn at 1:10 p.m., testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BLUMER:

Q Good afternoon, sir.

Would you tell the jury your name, please?

A Travis Troost.

Q All right, Mr. Troost, everybody in the jury is going to have to hear you clearly, so would you make sure you speak up loudly, please?

A Yes.

Q Make sure that the gentleman way back in the far corner there can hear you.

A All right.

Q He's the one you aim at.

A All right.

Q Tell us how you spell your last name.

A T-r-o-o-s-t.

Q How old are you?

A Eighteen.

Q Did you ever live in Clare County?

A Yes.

Q Is it true, Mr. Troost, that in -- on June the 1st of this year you got in trouble and were arrested by the Clare County Sheriff's Department?

A Yes, it is.

Q And you were put in the Clare County Jail at that time, is that right?

A Yes, I was.

Q What were you arrested for?

A Attempted murder, two counts of arson, and larceny.

Q Were you represented by an attorney after you were charged with that crime?

A Yes, I was.

Q And did your attorney negotiate with the prosecutor of Clare County to get you a plea deal?

A Yes, he did.

Q Did your attorney work out a deal for you?

A Yes he did.

Q And did you agree with him that that was the deal you wanted to go through with?

A Yes, I did.

Q When was your deal agreed to by you and your attorney with the prosecutor?

A July 9th.

Q Did the deal that you and the -- that your side and the prosecutor worked out have anything whatsoever in any way to do with Mr. John McRae?

A No, it did not.

Q At the time that you got into trouble and then later worked out a plea agreement with the prosecutor, did you even know that John McRae was a person who existed?

A No.

Q Did the plea agreement that you worked out require you to get involved with Mr. McRae in any way?

A No.

Q All right. You were in jail in Clare County into the month of July, is that correct?

A Yes, I was.

Q All right. In the month of July, did you experience any difficulties with any other inmates in the jail?

A Yes, there was an altercation in my cell, and I was moved.

Q All right. When you were first in the jail, when your attorney was working out the plea agreement with the prosecutor on your case, where were you located in the jail?

A In cell three.

Q Cell three.

Was Mr. McRae anywhere near you at that time?

A No, he was not.

Q As a result of having trouble with another inmate, did you testify that you were moved?

A Yes.

Q Where in the jail were you moved to?

A West max.

Q West max?

A Yes.

Q Another part of the jail?

A Yes.

Q While you were in west max did you come into contact with Mr. McRae?

A Yes, I did.

Q Do you see Mr. McRae in the courtroom?

A Yes, I do.

Q Point him out to us, please.

A Right there.

Q What's he wearing?

A Blue jacket.

Q Is he wearing a tie or not?

A No, he's not.

MR. BLUMER: Your Honor, I ask identification of the defendant for the record, please.

THE COURT: The record shall so indicate.

MR. BLUMER: Thank you.

BY MR. BLUMER:

Q Mr. Troost, how many people were in the west max cell block when you were there with Mr. McRae?

A Just me and him.

Q Is it a two-cell block?

A Yes, it is.

Q And for the jury's understanding is there a -- kind of a connection between the two cells within the block?

A Yes, there's a catwalk runs right -- connects both of them.

Q So if you're not locked down in your cells, can the two of you walk back and forth with each other?

A Yes, you can.

Q And did that occur while you were there with him?

A Yes, it did.

Q All right. At sometime in July of 1987 did you have occasion to have conversation with Mr. McRae?

I'm sorry. Did I say '87? July of this year, sir.

A Yes, I did.

Q And would you tell us, please, how that conversation came about?

A Um, we were watching TV and seeing a thing about a murder on TV, and he said, "That's sometimes misunderstood." And the next day I talked about -- I was telling him about everything that happened in my case, and he started talking about his.

Q All right. First you told him about your case and your legal problems?

A Yes.

Q And then after that he started talking about his?

A Yes, he did.

Q Did you ask him any guestions about his case to get him started talking?

A No, I did not.

Q It was just his turn to tell?

A Yeah, Pretty much.

Q What did he tell you about his case?

A Um, that he was suspected of murder. That, um, it happened out -- he lived somewhere around Harrison. He never told where, but he lived somewhere around Harrison, and that he was suspected of a murder there.

Q Okay. Did you have more conversation with him about that situation?

A Yes, I did.

Q When did that happen?

A Right around the same time.

Q Tell us what he said.

A He told me the whole story about that he believed -- okay, to start it all.

Q Take a breath and just relax.

A Um, he told about how the police believed there was a knife used, but there wasn't; there was a .22 single shot, an old gun that he had bought his son. That he had, um -- there was an altercation of some type, and he had -- the person was buried beside his barn covered with a big pile of manure, and that he said that a cadaver dog went right over top of it and never found it.

Q Okay. Let me go back. After he told you this, did you keep that information to yourself?

A For a short time, yes.

Q And after a short time, what did you do with the information?

A I asked the jailer to speak with somebody about it, and he got ahold of Detective McClellan, and I talked to him.

Q Why did you tell somebody about it?

A Because the way it -- the way he talked about it was just sick. Just weighed heavy on my mind pretty much, I guess.

Q Did you expect to get any favors from the prosecutor or the State --

A No.

Q -- because, of what you were telling them?

A No, I did not.

Q Did you ask for any favors from the prosecutor or the State because of what you were telling them?

A No, I did not.

Q Did you consider that what you were telling them was part the deal that you had already worked out with the State?

A No, I did not.

Q Or with the prosecutor?

A No.

Q Is the only reason that you told what you told was because it was weighing on your mind, as you testified to?

A Yes.

Q Did you ever get any favors in your treatment because of the information that you sent to Detective McClellan about what Mr. McRae had said to you?

A No.

Q All right. Let's be specific about the things that Mr. McRae told you about the events that happened when he lived in Harrison

A Okay.

Q All right. Number one, tell us who he was talking about to the best of your ability to remember?

A A young boy. He never said a name.

Q He never said a name, but he said it was a young boy?

A Yes.

Q Did he give an age to the boy?

A Around 15.

Q That was his statement?

A Yeah, somewhere in there. Yes.

Q And to the best of your memory would you describe, please, what he said what happened to that boy, and if he said anything about it, why it happened to the boy?

A Um, he never really came out -- never really said a good reason behind it. I mean, he said a couple -- just, you know -- he never really said a true reason behind why it happened, but he said that an altercation happened right around his house and that he had shot the boy twice with a .22, and that he buried it beside his barn. And he said that there was a big old pile of manure on top of it.

Q Okay. And what did the manure have to do with it?

A He says it covered up the smell for the cadaver dog, but I don't know anything about cadaver dogs so.

Q But he told you that?

A Yes.

Q Now, you have already testified that he described a weapon involved.

A Yes.

Q Tell us again what that weapon was described as?

A .22 single-shot bolt action. It was an old gun that he bought for his son.

Q Prior to Mr. McRae making that statement to you, did you ever hear about him shooting anybody?

A No, I did not.

Q Did you ever have any idea if he had killed anybody, how he might have done it?

A Um, no.

Q Is the first way you found out that Mr. McRae had either killed somebody or how he killed somebody was from his own mouth?

A Yes.

Q Is there a television in that wing?

A Yes, there is.

Q And did you ever see any news reports about Mr. McRae before he made that statement to you?

A No, I did not,

Q Mr. Troost, when you were in jail, did you have a habit of keeping a calendar to help you keep track of the days?

A Yes, I did.

Q And did you ever make a notation on your calendar about various things that happened to you?

A Yes, I did.

Q And let me show you a copy. Can you tell me if you recognize what this is a Xerox copy of, please?

A Yes, it's a full page of my calendar.

Q Do you recognize this as a copy of your own calendar?

A Yes, I do.

Q Do you recognize it as something that you yourself created?

A Yes.

Q Do you know where the original of this is?

A Um, it's in existence, but I could not find it to bring here so. . .

Q Did you try to find it?

A Yes, I did. I looked everywhere.

Q All right. Do you recognize this --

A Yes.

Q -- as a complete and accurate copy of your own calendar?

A Yes.

MR. BLUMER: Your Honor, I'm going to ask that this be marked, please.

BY MR. BLUMER:

Q Mr. Troost did you put the entries on this calendar at about the time that they happened or became important to you?

A Yes, usually right on that day.

Q You didn't wait until much later?

A No, it was usually right on that day.

Q Right on the day. All right.

A Yeah.

Q So the things that appear on this calendar are things that you wrote at about the time they happened?

A Yes.

THE COURT: What is it marked as, counsel?

MR. BLUMER: It's marked as proposed ten, Your Honor.

THE COURT: All right.

MR. BLUMER: Your Honor, the People now offer People's Exhibit No. 10.

MR. GREER: We would object to it, Your Honor, for a couple reasons. First, it's obviously a copy, as has been indicated; but also, the copy quality is so poor that a lot of the information is missing. It's difficult with a copy to look at whether things may have been placed down at different points in time or whether they all bear the same type of handwriting. The accuracy of the information contained on an original is the reason why originals are necessary to be used as pieces of evidence. So we would object to this being admitted as evidence We think it would be misleading and it's a copy.

THE COURT: Mr. Blumer?

MR. BLUMER: Your Honor, I can present it to the Court for the Court's inspection. I don't think it's that hard to read, and particularly I draw the Court's attention to the date of the 13th, which is what I'm going to ask the witness about from this calendar

MR. GREER.: Your Honor, I don't have any objection to him asking the witness to refresh his memory from the document that the witness may have put together, but I do have objection to it coming in as evidence.

THE COURT: Well, in terms of it being a copy, there's been no foundation set as to when this was copied or anything else at this point in time.

MR. BLUMER: I'm not sure that's significant, Your Honor, if he testifies that it's a true and accurate copy of what he knows to be the original. It short circuits the whole time issue

THE COURT: I think it's necessary.

MR. BLUMER: All right.

THE COURT: When was that prepared, that copy, if you know.

THE WITNESS: Um, right around the middle of July, late July.

THE COURT: Who made the copy?

THE WITNESS: Um, Detective McClellan.

THE COURT: Okay. And this is the copy -- did you see the copy after it was made?

THE WITNESS: Yes, I did.

THE COURT: Okay. And is this the copy that was made?

THE WITNESS: Yes, it is.

THE COURT: All right, I'll admit it into evidence.

(People's Exhibit No. 10 admitted into evidence.)

MR. BLUMER: Thank you.

BY MR. BLUMER:

Q Mr. Troost let me draw your attention to the date of July 13th on this calendar. Can you tell me if you made any entries on that date that have anything to do with what you've just testified to?

A Yes. I wrote "John told." That's the day that he told me the story.

Q "John told"?

A Yes.

Q And what does that signify to you, sir?

A That's the date that he -- that's when he told me this whole story.

Q And that would have been July 13th in –

A The p.m.

Q -- in the afternoon? And that was in the max--

Q Yes. Right in the max cell.

Q -- wing of the jail?

A Yes.

MR. BLUMER: Excuse me, Your Honor.

Thank you, Your Honor. We have no further questions

THE COURT: Cross-exam

MR. GREER: Yes, Your Honor.

CROSS -EXAMINATION

BY MR. GREER:

Q Good afternoon Mr. Troost.

A Good afternoon

Q Let's go back and work through the time frames of your jail stay.

A All right

Q You testified, did you not, that you were incarcerated initially on June 1st?

A Yes.
Q And what cell were you placed in at that point in time?

A When I first came in, I was put in the holding cell. I Was there for three days, and then I was moved to C-3.

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THE COURT: You may step down.

Call your next witness.

MR. BLUMER: Your Honor, the People call Mr. Dean Heintzelman to the stand.

THE CLERK: Right up here, sir.

Would you raise your right hand, please.

You do solemnly swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

MR. HEINTZELMAN: I do.

THE CLERK: Take a seat right over there, please.

DEAN HEINTZELMAN,

being first duly sworn at 1:45 p.m., testified on his oath as follows:

DIRECT EXAMINATION

MR. BLUMER:

Q Good afternoon, sir.

A Hi.

Q Would you tell the jury your name, please?

A Robert Dean Heintzelman, Sr.

Q How do you spell your last name?

A H-e-i-n-t-z-e-l-m-a-n.

Q Mr. Heintzelman, do you have a son?

A Yes, I do.

Q And what's his name?

A I have got two sons. Michael Dean Heintzleman is my youngest son.

Q All right. Where do you live, sir?

A 1100 South Bass Lake Avenue, Harrison.

Q How long have you lived in the Harrison area?

A Approximately 40 years.

Q Does that include the time period of the summer of 1987?

A Yes, sir.

Q In that time period did you know somebody named John McRae?

A Yes, sir.

Q How did you know him?

A He was my neighbor.

Q Where did he live at the time?

A He lived on Monroe Road, just around the corner from me.

Q I'll show you a photograph that has been admitted as People's Exhibit No. 1, sir. Do you recognize what this shows?

A Yes, sir.

Q Tell the jury what this is.

A That's the McRae property right there. Monroe Road is out in front of the old house there. There's a trailer house behind the old house and a barn right there by the trailer.

Q Is this the way the property looked in 1987 when Mr. McRae lived on it?

A Yes, sir.

Q And who lived on that property at the same time with Mr. McRae?

A His son Marty and his wife Barbara.

Q What was your relationship with Mr. McRae in those days?

A We were just neighbors.

Q Were you on a friendly basis?

A Yeah. Yeah.

Q Did you go over to his property on occasion?

A On occasion, I did, yes.

Q What type of activities did he have going on on his property?

A Well, he was in -- he was a clown leader, and they had the goats in 4-H. And that was about it.

Q And did he have goats on his property?

A Yes, sir, he did.

Q For the most part, where did he keep the goats on his property?

A He kept the goats down in the barn there.

Q In that red barn?

A In that little red barn, yes.

Q And am I correct that at that time period Mr. McRae also had a son?

A Yes, Martin.

Q And was -- how did his son compare in age to your son at that time?

A I believe they were a year apart, something -- somewhere in there. Pretty close to the same age.

Q Okay. Did they pal around as kids?

A Yes, they did.

Q Now -- and you were on a friendly basis with Mr. McRae while he was your neighbor?

A Yes, sir.

Q How are you employed, sir?

A I'm self-employed. I own D and K Excavating in Harrison.

Q Do you have another part—time job?

A No, sir, I don't.

Q Do you do any work --

A Oh, excuse me, I work for the -- I'm a reserve for the Glare County Sheriff's Department.

Q All right. And when you are acting in your reserve capacity, do you wear a sheriff's uniform?

A Yes, I do.

Q I'm sorry, a deputy's uniform?

A Yes, I do.

Q All right. And do you have various activities that you perform for the Sheriff's Department in uniform?

A Yes, I do. I go on transport, transport prisoners. We take care of ball games, do security at ball games. We help with visitation at the jail. That sort of stuff.

Q Now, at some point in 1987 did you become aware that Mr. McRae had left the community?

A Yeah.

Q Do you know when that was, sir?

A I believe around November, but I'm not sure. I can't -- October or November, somewhere in there.

Q Late in the year?

A Yeah.

Q Do you remember when the town became aware that Randy Laufer was missing?

A Yes. Yeah, I do.

Q To your memory, sir, did Mr. McRae leave the Harrison community before or after Randy Laufer was found to be missing?

A I'm not sure. I believe it was shortly after, but I'm not sure.

Q All right. Now, Mr. Heintzelman, did you become aware sometime in 1998 that Mr. McRae was back in your community?

A Yes, I did.

Q And what was your knowledge of where he was at that time?

A I knew he was in jail, in our jail up here.

Q And did you receive any information from Mr. McRae directed to you?

A I received information through my mother, who is also a reserve, that Mr. McRae --

MR. GREER: Your Honor, I object if there is going to be, you know, specific testimony that would be hearsay.

THE COURT: Is it being treated --

MR. BLUMER: It's only being offered to show foundation for future testimony. It's not being offered for the truth of the statement, Your Honor.

THE COURT: Overruled.

MR. BLUMER: Thank you.

BY MR. BLUMER:

Q What information was passed to you through your mother, sir?

A My mother does visitation at the jail, too. She works visitations. And Mrs. McRae was visiting John, and Mrs. McRae told my mother that he was wondering why my son Mike and myself hadn't been up to see him and that

we would like us to see him. So my mother told me what Barbara told her, and so I went in to see Mr. McRae.

Q Did you understand that to be an invitation from Mr. McRae to come talk with him?

A Yes, I did.

Q Did you take him up on his invitation at some time?

A It was later on, probably about three or four days, could have even been a week after that.

Q Do you remember the date that you finally met with Mr. McRae?

A I'm not positive of the date.

Q Let me show you something. And would you tell me, please, if looking over this document refreshes your memory as to when it might have been?

A Well, must have been in December.

Q Are those notes that you yourself wrote, sir?

A Yes they are.

Q And reviewing those notes that I've just handed you, did that help you remember when it was that you met with Mr. McRae?

A It was December 7th.

Q Is that a date that is reflected in your notes?

A Yeah, got it wrote right here.

Q And when did you write those notes that you have refreshed your memory with?

A It would have been sometime in December. Probably it must have been around the 10th or so probably when I wrote the note.

Q Within a couple days of it happening?

A Right. Yeah.

THE COURT: Which year?

THE WITNESS: Of 1998. I'm sorry, this is '98. ' 97, I'm sorry.

BY MR. BLUMER:

Q All right. So I believe your testimony was on December 7th of 1997 you took Mr. McRae up on his invitation and went to see him?

THE COURT: Well, counsel, you cannot say this was his invitation. That was what the objection was.

MR. BLUMER: Your understanding, I'm sorry.

THE COURT: He believed that there was a request, but there's no assertion that in fact that there was a request from Mr. McRae, and it was not admitted in for that purpose. So do not refer to it in that context.

BY MR. BLUMER:

Q Did you go to see Mr. McRae on that date?

A Yes, I did.

Q Were you in uniform when you went to see him?

A Yes, I was.

Q What time of day did this happen?

A This was late at night. I believe it was around 11, 11:30. I just come in from doing a transport that evening, and I thought well, as long as I'm here at the jail, I'll go in and see John.

Q Tell us to the best of your memory exactly what happened when you went to see him.

A I asked the corrections officer, you know, to take me back to see John; I'd like -- because he had been asking to see me. So I went back, and the corrections officer took me back to the cell. I seen John there, John come over to the bars and everything. We shook hands. And I asked John -- John showed me pictures of Marty. His son Marty had gotten married and had a baby and everything, and he was showing me pictures. And then I asked John, I come out and asked Jon, I said, "John, Did you -- did you kill Randy Laufer?" And at that time he didn't answer me. And we kept -- we talked, you know, just neighborly talk again for a while. Finally I said, "You know, John," I said, "they think Marty had something to do with this." He says, "Well," he said, if they try to pin it on Marty, I'll let them fry my ass." And then I said -- I asked John again, I said, "John, did you have anything to do with this? And he said, "It was bad, Dean. It was bad."

Q Did he make any physical motion or reaction when he said that?

A He hung his head, hung his head down and said, "It was bad, Dean. It was bad."

Q Did you pursue the subject any further?

A At that time I was so mad myself, I got out of there.

Q After that time, have you ever talked to Mr. McRae again?

A No, I have not.

Q When this conversation occurred, were you wearing a sheriff's deputy uniform?

A Yes, sir, I was.

Q Were the lights on in the cell block?

A Yes, sir, they were, because he showed me the pictures of Marty's baby that he had in there and Marty.

MR. BLUMER: Thank you, Mr. Heintzelman

CROSS-EXAMINATION

BY MR. GREER:

Q Good afternoon, Mr. Heintzelman

Have you ever been involved in a case like this before?

A No, sir.

Q You were out at the scene when Randy's bones were located, weren't you?

A Yes, I was,

Q Was there a fair amount of discussion going on out there concerning the Laufer case?

A No more than normal.

Q You testified that when you went to see John in the cell it was late at night. Could it have been as late as one o'clock in the morning?

A I don't believe it was that late, no.

Q Was John asleep when you arrived there?

A No, he was laying down. He was laying on his bunk.

O Could he have been asleep and just startled awake as you arrived?

A Didn't appear to be. When I come in the room, he walked up to the bars.

Q Well, did you arrive in the room and he then got up and walked over or --

A I believe so. He was resting on the cot, but I don't believe he was sleeping.

Q Okay. So he was laying on the cot, and you're uncertain whether he was sleeping. You came in and stood in front of the bars, and he then got up and came over?

A Right.

Q Now the area where this took place at is west max?

A West max, yes.

Q And that's a cement block cell block basically?

A Primarily. It's got bars and a door.

Q But the top and bottom and everything outside --

A Right.

Q -- the area is all cement block?

A Right.

Q Sort of like being inside a cave in a way, isn't it?

A Well, you come in, I call it a catwalk, but it's just a hallway. You come around the corner, and there's the cell right there.

Q It's an area where sometimes it's difficult to understand what people are saying because of the echoes in there, isn't it?

A No, not when you're standing from me to the judge or closer.

Q Okay. So you're saying in this case there was no difficulty?

A No.

Q Have you ever been in there and had difficulty understanding someone because of the echoing off the cement block walls?

A I never have, no.

Q You have good hearing?

A Fairly good, yes.

Q Was John right close to you when you were discussing this matter with him?

A Like I said, closer than me and the judge. We shook hands through the bars when I first got there even.

Q Now, today your testimony was that while you and John were talking first, you asked John if he killed Randy and he didn't say anything?

A That's correct.

Q Second, you two had some discussion about Marty; and then third, you asked him again and he made a statement about it being bad and hung his head?

A That's when I left.

Q Previously you have looked at a statement that you wrote out. Actually, do you have the original of it there? Would you look back over that statement?

A Which part?

Q Well, read it all to yourself at this point. Actually starting probably with the third paragraph.

A All right. Yeah, it's the same thing as I've just told you, only it might be one in front of the other.

Q Well, let's look at it. Don't you indicate in there that you talked with John for a while and you asked him if he killed Randy and at that point he didn't say anything and hung his head?

A I left after he done that. So like I said, it could have been -- I could have asked him -- that's what I asked him last, but you've just got it turned around here.

Q Well, look again at that statement. Isn't that in your handwriting?

A Yes, it is.

Q Isn't that the statement that you prepared?

A Yes, it is.

Q But you're saying that you wrote stuff down wrong then from what you remember now?

A No, what I remember then is the same thing I remember now. It might just be a different sequence here. I'm talking to a man at the time who used to be my neighbor.

Q I can appreciate that. But what we're inquiring here is some of the things in terms of your recollection of what John said to you, you know, and what you're saying now appears to be somewhat different from what you wrote down back on December 10th.

A No, December 7th.

Q Well --

A It's when I was in there to see him.

Q Didn't you indicate to Mr. Blumer that the statement says you were there on December 7th but that you probably wrote this statement out three or four days later?

A That's true, yes.

Q So you're saying that maybe your recollection of things wasn't the most accurate when you wrote it down?

A My recollection is just fine. Just like I just tried to tell you, it may be in different sequences. One question might have been asked first before the other one was, other than what I have got wrote down here, but it's all here, and I remember it up here very well what was said.

Q Now, in the discussion that you had with John, John never said he killed Randy, did he?

A No, he never come out and told me he killed Randy. I never said that.

Q In fact -- strike that.

When you and John were talking in the cell, he had been in the cell for a period of time, had he not?

A Yes, he had.

Q And you were aware that it wasn't the most pleasant situation that he was here in jail, for one thing?

A Yeah.

Q Couldn't it be possible that you misheard what John said; that he could have said something, for instance, "This is bad," rather than "It was bad"?

A No, I don't think so. We were standing like I said, right face-to-face with the man. I was --

Q But you don't think that's what he said?

A No.

MR. GREER: No other questions, Your Honor.

MR. BLUMER: Nothing further, Your Honor. Thank you.

THE COURT: You may step down.

MR. BLUMER Your Honor, the People rest.

THE COURT: Members of the jury, we'll take a break at this point in time for a few minutes You will be excused to go into the jury room.

(2:00 p.m. - Jury excused.)

MR. GREER: Your Honor, if the Court would excuse the jury for a moment, there will be one matter.

THE COURT: The record should reflect the jury is no longer in the courtroom.

You may proceed.

MR. GREER: Thank you, Your Honor.

I would like at this point in time to make a motion that the Court direct a verdict of not guilty as to the first-degree murder charge in this matter. We don't believe that there's been evidence showing that would allow the jury to determine that there had been intent or premeditation

(3)

No. 04-132

Supreme Court, U.S.
FILED
NOV 18 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

JOHN RODNEY McRAE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT OF INDIGENCY

* BRIEF IN OPPOSITION *

CERTIFICATE OF SERVICE

SUBMITTED BY:
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No. 04-132

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JOHN RODNEY McRAE,

Respondent.

_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, JOHN RODNEY McRAE, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the Michigan Supreme Court without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

MARLA R. McCOWAN (P 57218)
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(313) 256-9833

Date: November 18, 2004

IN THE
SUPREME COURT FOR THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

JOHN RODNEY McRAE,

Respondent.
_____/

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Affidavit in Support of Motion
I swear or affirm under penalty of perjury that, because of my poverty, I cannot pre-pay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury that my answers on this form are true and correct. (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: /s/ John R. McRae Date: 11-01-04

Instructions:
Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

My issue(s) on appeal is/are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the

monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months	Amount expected next month
Employment	$	$
Self-employment	$	$
Income from real property (such as rental income)	$	$
Interest and dividends	$	$
Gifts	$	$
Alimony	$	$
Child Support	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$
Disability (such as social security, insurance payments)	$	$
Unemployment payments	$	$
Public assistance (such as welfare)	$	$
Other (specify):	$	$
Total monthly income:	$ -0-	$ -0-

IMPRISONED

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Disabled	Imprisoned for	More Than	
10	years		

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or deductions.)

Employer	Address	Dates of	Gross
Disabled			

		employment	monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? $ -0-

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

ZERO

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

NONE

	Value
Home	$_____
Other real estate	$_____
Motor vehicle #1	$_____ Make/year:_____model:_____reg.#_____
Motor vehicle #2	$_____ Make/year:_____model:_____reg.#_____
Other assets	$_____
	$_____
	$_____
	$_____

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you	Amount owed to you	Amount owed to

NONE

or your spouse money		your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	NO ONE	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real-estate taxes included?	____ Yes ____ No	
Is property insurance included?	____ Yes ____ No	
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not included in motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in Mortgage payments	$_____	$_____
Homeowner's or renter's	$_____	$_____

Life	$	$
Health	$	$
Motor vehicle	$	$
Other:_____		
Taxes (not deducted from wages or included in Mortgage payments) (specify):_____	$	$
Installment payments	$	$
Motor vehicle	$	$
Credit card (name)_____	$	$
Department store _____	$	$
Other:_____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify)_____	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? _____ Yes __X__ No
If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? _____ Yes __X__ No
If yes, how much? $_____
If yes, state the attorney's name, address and telephone number:

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? _____ Yes __X__ No
If yes, how much? $_____
If yes, state the person's name, address and telephone number:

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I am completely without funds, disabled, unemployed and have been a pauper for over 10 years

13. State the address of your legal residence. Hill County Jail

Your daytime phone number: ( ) _____

Your age: _____ Your years of schooling: _____

Your social security number: _____

Havre, MT

59525

Attn: Paul Pemberton

DATE 11/17/04

INMATE ACCOUNTING
INMATE ACCOUNT RECORD

LEMS ID# 18373 MCRAE, JOHN RODNEY
LOCAL ID#

TRANS DATE	OFFICER	DESCRIPTION	DISBURSE MENTS	DEPOSITS	INMATE BALANCE
8/02/04	TESSNER, JAKE	BEGINNING BALANCE		.00	.00

BEST AVAILABLE COPY

No. 04-132

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

JOHN RODNEY McRAE,

Respondent.

_____/

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

SUBMITTED BY:
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Attorneys for Respondent John Rodney McRae

REASONS FOR DENYING THE WRIT

There Are No Compelling Reasons to Review the Decision of the Michigan Supreme Court.

A. MR. MCRAE'S RE-TRIAL IS SCHEDULED TO COMMENCE IN JANUARY 2005.

Several months ago the Michigan Department of Corrections released Mr. McRae to the Clare County Jail in anticipation of his re-trial. His case is in an active pre-trial posture with all motions due by Friday November 19, 2004 - the same due date as this brief in opposition to the petition for writ of certiorari. Mr. McRae's trial is scheduled to begin in January, 2005. Petitioner's Counsel has yet to seek a stay of the proceedings in the trial court and has not indicated the need for any type of expedited review by this Court of the instant petition.[1] Assuming for purposes of argument that the trial will begin as planned, any action by this Court may very well be an unwarranted and unnecessary waste of this Court's precious time and resources - regardless of the outcome at the re-trial. Therefore, certiorari should be denied.

B. THE MICHIGAN SUPREME COURT PROPERLY DETERMINED THAT MCRAE'S STATEMENT TO THE OFFICER WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The question presented in the Petition turns on whether Dean Heintzelman was acting as a state agent at the time he went to question Mr. McRae at the Clare County Jail. Petitioner largely takes issue with the Michigan Supreme Court's purported failure to follow the criteria set forth in other federal circuit and state court decisions that have addressed this subject. *See e.g., United States v. Gaday*, 894 F.2d 1307 (11th Cir. 1990) and *Cook v. Georgia*, 270 Georgia 820

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[1] Respondent is not suggesting that such expedited review is warranted given that the decision in this case is not nationally significant. *Cf. Bush v. Gore*, 531 U.S. 98 (2000) (implicating the elected president of the United States) or *U.S. v. Booker* (Docket No. 04-104) and *U.S. v. Fanfan* (Docket No. 04-105) (regarding this Court's recent decision in *Blakely v. Washington*, 124 S.Ct. 531 (June 24, 2004)).

(1999). It is Respondent's position that the Michigan Supreme Court correctly distinguished those cases from the instant matter.

Central to any decision in this case are the undisputed facts that Mr. McRae was arrested for the murder of Randy Laufer in September of 1997, he was appointed counsel, and was held in the maximum security wing of the Clare County jail awaiting a preliminary examination. (Petition at page 4). Mr. McRae indicated to his wife that he would like to see some friends and former neighbors while he was at the jail and such a message was conveyed to Dean Heintzelman. (Petition at page 5). Mr. McRae did not know that Dean Heintzelman was employed by the Sheriff's department. (Michigan Supreme Court Opinion at pages 5a-8a[2]).

In the petition, Dean Heintzelman is characterized as not only Mr. McRae's former neighbor and friend but also "a part-time volunteer, reserve deputy sheriff" presumably in an effort to downplay the fact that Dean Heintzelman was an agent of the Clare County Sheriff's department – the very department that investigated this crime. The state admits in the instant petition that at the time he visited Mr. McRae, Heintzelman was at the jail in connection with his duties, he was in uniform and had a badge displayed, and he asked permission to visit Mr. McRae at 11:00 p.m., after normal business hours. (Petition at page 5). At oral argument in the Michigan Supreme Court, the state conceded that "it was only by virtue of his status as a reserve deputy that Heintzelman was granted direct access to defendant's maximum-security cell, a restricted area where only governmental agents are normally allowed to tread." (Michigan Supreme Court Opinion at page 9a).

Furthermore, Dean Heintzelman was fully aware of the circumstances surrounding Mr. McRae's incarceration when he went to visit him in jail, given that he was called to McRae's

[2] The references are to the appendix of the petition.

former property when Laufer's body was unearthed and "was one of several people assigned to guard the perimeter of the gravesite overnight, until the Michigan State Police forensic evidence team could arrive the next day." (Petition at page 5).

The petition makes Herculean efforts to describe this conversation at the jail between McRae and Heintzelman as a friendly chat between former friends and neighbors. However, the Michigan Supreme Court correctly noted that Dean Heintzelman tried "at least *four separate times* to initiate questioning regarding the investigation". (Michigan Supreme Court opinion at page 13a) (emphasis in original). McRae never waived his right to counsel, but went on to make incriminating statements that the Michigan Supreme Court found to be illegally obtained.

The petition for writ of certiorari suggests that this Court adopt a "bright line test" to determine whether a person is a state actor at the time of such questioning. It is Respondent's position that the Michigan Supreme Court's decision is in line with the authority that is urged in the petition (at page 18) and in fact does not even present a close question for this Court.

Focusing on the "purpose of the visit", a position taken by Petitioner and detailed by the Eleventh Circuit in *United States v. Gaddy*, *supra* at 1311, the Michigan Supreme Court affirmatively found that Dean Heintzelman was part of the police team present for the recovery of the victim's body from Mr. McRae's former residence. Furthermore, the Court found that at the time of the questioning Heintzelman was not acting out of any concern for McRae's welfare. (Michigan Supreme Court Opinion at page 10a). The Michigan Supreme Court distinguished the absence of state action in *United States v. Gaddy*, *supra* (involving the defendant's statements to his police-officer aunt), and *Cook v. Georgia*, *supra* (involving the defendant's statements to his FBI-agent father) largely because McRae and Heintzelman were not very close. (Michigan Supreme Court Opinion at page 10a-11a, and 11a n.10). That decision is sound.

Heintzelman's interrogation violated Mr. McRae's constitutional rights. No amount of clever argument can disguise or dress up what Heintzelman did. By pushing Mr. McRae to admit guilt, purporting to relate what authorities believed about the circumstances of the crime and again seeking a confession, reporting the conversation to his superior officer, and testifying against Mr. McRae in court, Heintzelman was not acting as a friend. Rather, he was most decidedly placing Mr. McRae into a "critical confrontation[] with his adversary." *Michigan v. Jackson*, 475 US 625, 630 (1986) (quoting *United States v. Gouveia*, 467 US 180, 189 (1984)). The statements extracted during that interrogation were elicited at Heintzelman's instigation and were inadmissible at trial.

Petitioner's argument that the error was harmless is inherently suspicious. As this Court stated in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) "[a] confession is like no other evidence." In a circumstantial case like McRae's, it was incumbent on the trial court to proceed with caution:

> "[T]he risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id.*

Though this case does not involve a confession *per se*, the statements made by McRae are also not appropriately characterized as "ambiguous" by Petitioner. (Petition at page 29). Aside from circumstantial evidence of McRae's guilt, the other "evidence" against him at trial was a jailhouse confession and evidence of a prior crime that McRae committed when he was fifteen years old. Without the statements McRae made to Dean Heintzelman, the credibility of the witnesses and evidence is marginal at best. Thus, the error was not harmless.

C. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.

This is not a close case and it truly is not debatable among reasonable jurists. Assuming for the sake of argument alone that the Michigan Supreme Court failed to clearly articulate a rule for determining what action constitutes state action, the result would still be the same and be in line with the cases urged by the Petitioner. This Court will rarely find a compelling reason for granting certiorari in erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 10.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

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Date: November 18, 2004

(2)

Supreme Court, U.S.
FILED
DEC 2 - 2004
OFFICE OF THE CLERK

No. 04-132

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

v.

JOHN RODNEY MCRAE

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent suggests in his brief in opposition that the Petitioner's claim has been mooted by the fact that the trial court has indicated that the retrial will be scheduled to begin in January 2005. But Petitioner has filed a timely motion for stay in the trial court asking that the trial be stayed in such a way as to allow this Court an opportunity to review the petition. The motion deadline was November 19, 2004. Respondents' response to this motion in the trial court is not due until December 10, 2004.

The fact that the trial court has not yet granted Petitioner's motion to stay should not dissuade this Court from examining this compelling claim where the Michigan Supreme Court's decision conflicts with other federal and state jurisdictions on the matter. There was no violation of Respondent's Sixth Amendment rights when Respondent initiated a conversation with an old friend, who was a part time, off-duty reserve sheriff, and then made admissions during that meeting.

CONCLUSION

Petitioner requests that this Court grant certiorari, reverse the Michigan Supreme Court's decision, and reinstate Respondent's conviction for first-degree murder.

Respectfully submitted,

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